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FCC Record

(Cumulative index to Volume 5, included.)

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Alfred C. Sikes, Chairman

James H. Quello

Sherrie P. Marshall

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Federal Communications Commission Record

Volume 5
Issue 26

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... v

Table of Rulemaking Numbers..... vi

Table of Localities..... vii

Table by Subject Matter..... viii

Table by Statutory and Rule Provisions..... xi

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 7564

Cumulated Index to Volume 5..... 7742

How to use this Index..... 7743

Table of Cases..... 7744

Table of FCC and Delegated Authority Numbers..... 7803

Table of Docket Numbers..... 7833

Table of Rulemaking Numbers..... 7851

Table of Localities..... 7861

Subject Index..... 7880

Federal Communications Commission Record

Table of Cases
Volume 5
Issue 26

Case Name	Page
AT&T Communications	7575
Advanced Broadcast Technologies, Inc.	7651
Amateur Handicapped Accessibility	7626
Amended Procedures for Filing Applications for Frequencies	7718
Amendment of Part 36 - Establishment of a Joint Board	7578
Amendment of Part 97 - Amateur Operator License	7631
Amendment of Part 97 - Amateur Radio Services	7658
American Telegram Corp.	7668
American Telephone and Telegraph Co.	7715
American Telephone and Telegraph Company	7727
American Telephone and Telegraph Company	7589
American Telephone and Telegraph Company	7616
American Telephone and Telegraph Company	7709
Belisle, Joseph A., Esquire	7585
Bell Atlantic Telephone Companies	7674
BellSouth Telephone Companies	7619
CSJ Investments, Inc.	7653
Cable & Wireless Communications, Inc.	7583
Computer III Remand Proceedings	7719
Congaree Broadcasters, Inc.	7691
Cooke Cablevision, Inc.	7620
Definition of a Cable Television System	7638
Dickeyville Telephone Corporation	7698
Dolgoff, Howard B.	7695
Emerald Enterprises, Inc.	7581
Falk, Laverne J.	7705
Fresno FM Limited Partnership	7612
GTE Telephone Operating Companies	7740
Grant County Broadcasters	7701
Guy Gannett Publishing Co.	7688
Hulse, Michelle Elaine (ERRATUM)	7608
KKWM(AM)	7735
Keymarket Communications of Columbia, Inc.	7693
Lamont, Brian E.	7703
MCI Telecommunications, Corp.	7710
Maricopa County Community College District	7614
Message Center, Inc.	7622
Modifications and Improvements to Tariff Review Plans	7617
New Digital Audio Radio Services	7593

FEDERAL COMMUNICATIONS COMMISSION

Case Name	Page
Omega Cellular Partners	7624
One Call	7712
Patriot Broadcasting Company, Inc.	7605
Phone America of Carolina, Inc.	7592
Playa Del Sol Broadcasters	7606
Rates for Dominant Carriers	7618
Rates for Dominant Carriers (ERRATUM)	7664
Revision of Part 15, Radio Frequency Devices	7729
Rogers Broadcasting, Inc.	7699
Russo, Roy R., Esquire	7586
Simla Broadcasting	7646
Stark, Frederick K.	7669
TRT/FTC Communications, Inc.	7733
TRT/FTC Communications, Inc.	7716
Table of Allotments, FM, Adams, WI	7595
Table of Allotments, FM, Banks, OR	7675
Table of Allotments, FM, Big Spring, TX	7568
Table of Allotments, FM, Clinton, AR	7666
Table of Allotments, FM, Clintonville and New Holstein, WI	7573
Table of Allotments, FM, Cold Spring and Litchfield, MN	7598
Table of Allotments, FM, Copeland, KS	7682
Table of Allotments, FM, Decorah, IA	7680
Table of Allotments, FM, Hardinsburg, KY	7684
Table of Allotments, FM, Houston and Thayer, MO	7678
Table of Allotments, FM, Lynchburg, VA	7597
Table of Allotments, FM, Marion and Rural Retreat, VA	7686
Table of Allotments, FM, Milan, Metter, Swainsboro and Wrens, GA	7670
Table of Allotments, FM, Oscoda, MI	7677
Table of Allotments, FM, Otterville, MO	7594
Table of Allotments, FM, Park Falls, WI	7574
Table of Allotments, FM, Perry, Cross City, Holiday, FL	7602
Table of Allotments, FM, Pinewood, SC	7609
Table of Allotments, FM, Portage, WI	7672
Table of Allotments, FM, Stamford, NY	7566
Table of Allotments, FM, Tahlequah, OK	7600
Table of Allotments, TV, Alamosa, CO	7564
Table of Allotments, TV, Anchorage, Palmer and Seward, AK	7570
Technical Assignment Criteria for AM Broadcast Service	7726
Telefonica Larga Distancia De Puerto Rico	7582
US Sprint Communications Company Limited Partnership	7714
United States Satellite Broadcasting Company, Inc.	7576
WWOR-TV, Inc.	7656
Waiver of Equal Access Implementation Requirements	7708
Wilson III, James	7603

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 5
Issue 26

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 90 -1237	7740	DA 90 -1823	7593
DA 90 -1368	7675	DA 90 -1824	7586
DA 90 -1478	7603	DA 90 -1825	7585
DA 90 -1479	7605	DA 90 -1826	7619
DA 90 -1480	7606	DA 90 -1828	7726
DA 90 -1522	7666	DA 90 -1829	7677
DA 90 -1538	7669	DA 90 -1830	7678
DA 90 -1543	7664	DA 90 -1831	7680
DA 90 -1557	7733	DA 90 -1832	7682
DA 90 -1605	7699	DA 90 -1833	7684
DA 90 -1607	7701	DA 90 -1834	7686
DA 90 -1608	7703	DA 90 -1835	7608
DA 90 -1609	7705	DA 90 -1839	7624
DA 90 -1625	7670	DA 90 -1842	7718
DA 90 -1630	7672	DA 90 -1843	7620
DA 90 -1678	7668	DA 90 -1844	7622
DA 90 -1691	7674	DA 90 -1845	7727
DA 90 -1798	7564	DA 90 -1846	7688
DA 90 -1799	7566	DA 90 -1847	7708
DA 90 -1801	7581	DA 90 -1848	7698
DA 90 -1802	7568	DA 90 -1849	7710
DA 90 -1803	7570	DA 90 -1850	7714
DA 90 -1804	7573	DA 90 -1851	7715
DA 90 -1805	7574	DA 90 -1852	7709
DA 90 -1806	7594	DA 90 -1853	7712
DA 90 -1807	7595	DA 90 -1863	7716
DA 90 -1808	7597	FCC 90 - 340	7638
DA 90 -1809	7616	FCC 90 - 352	7735
DA 90 -1810	7617	FCC 90 - 360	7609
DA 90 -1811	7618	FCC 90 - 366	7651
DA 90 -1812	7589	FCC 90 - 367	7653
DA 90 -1814	7575	FCC 90 - 369	7656
DA 90 -1815	7592	FCC 90 - 370	7658
DA 90 -1818	7602	FCC 90 - 392	7691
DA 90 -1819	7598	FCC 90 - 393	7693
DA 90 -1820	7600	FCC 90 - 394	7695
DA 90 -1821	7582	FCC 90 - 402	7576
DA 90 -1822	7583	FCC 90 - 404	7729

Delegated Authority or FCC Number	Page
FCC 90 - 413	7626
FCC 90 - 414	7631
FCC 90 - 415	7719
FCC 90D - 49	7646
FCC 90J - 1	7578
FCC 90R - 117	7612
FCC 90R - 119	7614

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 5
Issue 26

Docket Number	Page
CC Dkt.No.80 - 286	7578
CC Dkt.No.87 - 120	7718
CC Dkt.No.87 - 313	7664
CC Dkt.No.87 - 313	7618
CC Dkt.No.90 - 368	7719
GEN Dkt.No.90 - 357	7593
MM Dkt.No.86 - 493	7570
MM Dkt.No.87 - 267	7726
MM Dkt.No.87 - 455	7602
MM Dkt.No.87 - 560	7646
MM Dkt.No.88 - 21	7612
MM Dkt.No.88 - 382	7656
MM Dkt.No.88 - 442	7614
MM Dkt.No.88 - 474	7651
MM Dkt.No.89 - 35	7638
MM Dkt.No.89 - 418	7670
MM Dkt.No.89 - 516	7684
MM Dkt.No.89 - 540	7653
MM Dkt.No.89 - 548	7573
MM Dkt.No.89 - 556	7682
MM Dkt.No.90 - 86	7672
MM Dkt.No.90 - 319	7677
MM Dkt.No.90 - 366	7597
MM Dkt.No.90 - 404	7574
MM Dkt.No.90 - 409	7594
MM Dkt.No.90 - 412	7686
MM Dkt.No.90 - 462	7675
MM Dkt.No.90 - 502	7608
MM Dkt.No.90 - 504	7606
MM Dkt.No.90 - 518	7603
MM Dkt.No.90 - 519	7605
MM Dkt.No.90 - 521	7666
MM Dkt.No.90 - 541	7705
MM Dkt.No.90 - 542	7701
MM Dkt.No.90 - 556	7703
MM Dkt.No.90 - 558	7699
MM Dkt.No.90 - 610	7566
MM Dkt.No.90 - 611	7564
MM Dkt.No.90 - 614	7568
MM Dkt.No.90 - 615	7595
MM Dkt.No.90 - 616	7598
MM Dkt.No.90 - 617	7600
MM Dkt.No.90 - 619	7678
MM Dkt.No.90 - 620	7680
PR Dkt.No.90 - 55	7631
PR Dkt.No.90 - 356	7626
PR Dkt.No.90 - 561	7658

Table of Cases by Rulemaking Number
Volume 5
Issue 26

Rulemaking Number	Page
RM - 5525	7570
RM - 5829	7570
RM - 5899	7602
RM - 6223	7602
RM - 6224	7602
RM - 6225	7602
RM - 6226	7602
RM - 6794	7682
RM - 6879	7670
RM - 6927	7684
RM - 7017	7573
RM - 7155	7672
RM - 7201	7677
RM - 7221	7597
RM - 7241	7658
RM - 7242	7658
RM - 7243	7658
RM - 7244	7658
RM - 7252	7670
RM - 7277	7574
RM - 7289	7686
RM - 7344	7594
RM - 7439	7568
RM - 7465	7666
RM - 7467	7675
RM - 7533	7564
RM - 7547	7566
RM - 7552	7595
RM - 7554	7598
RM - 7564	7600
RM - 7565	7678
RM - 7577	7680

Federal Communications Commission Record

Table of Cases by City
Volume 5
Issue 26

City/State	Page	City/State	Page
Adams, WI	7595	Miami, FL	7688
Alamosa, CO	7564	Milan, GA	7670
Anchorage, AK	7570	New Holstein, WI	7573
Avon Park, FL	7602	Orangeburg, SC	7693
Banks, OR	7675	Oscoda, MI	7677
Big Spring, TX	7568	Otterville, MO	7594
Chandler, IN	7608	Palmer, AK	7570
Clinton, AR	7666	Park Falls, WI	7574
Clintonville, WI	7573	Perry, FL	7602
Cold Spring, MN	7598	Phoenix, AZ	7614
Copeland, KS	7682	Pinewood, SC	7609
Cross City, FL	7602	Portage, WI	7672
Dallas, TX	7735	Rayne, LA	7646
Decorah, IA	7680	Rural Retreat, VA	7686
Dennysville, ME	7703	Sarasota, FL	7602
Dothan, AL	7603	Secaucus, NJ	7656
Elizaville, NY	7669	Seward, AK	7570
Fresno, CA	7612	St. George, VT	7622
Hardinsburg, KY	7684	St. James, MN	7699
Hinesville, GA	7605	Stamford, NY	7566
Holiday, FL	7602	State College, PA	7651
Houston, MO	7678	Swainsboro, GA	7670
Juneau, AK	7620	Tahlequah, OK	7600
Key West, FL	7653	Tallahassee, FL	7695
Litchfield, MN	7598	Thayer, MO	7678
Lynchburg, VA	7597	Wautoma, WI	7573
Marion, VA	7686	West Columbia, SC	7691
Mecca, CA	7606	Whitewater, WI	7705
Metter, GA	7670	Williamstown, KY	7701
Miami, FL	7586	Wrens, GA	7670

Subject Index
Volume 5
Issue 26

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Misrepresentation and lack of candor	7651
Site availability or suitability	7651
Orders or Notices	
Lottery to select licensee	7605, 7606
Amateur Radio Service (ARS)	
ARS - Aliens, operation of station by	
Alien amateur to operate a station in the U.S., permission for an	7631
ARS - General information	
Definitions	7658
ARS - Transmissions and practices, prohibited	
International communication, limitations on	7658
Obscenity/indecency/profanity prohibited	7631
Volunteer-Examiner Coordinators (VEC)	
VEC to accredit examiners to prepare and administer exams	7631
Broadcast Radio Services - General Rules	
Changes, renewals in existing stations	
Assignment or transfer of control, application for voluntary	7585, 7586
Licenses and permits	
Multiple ownership of broadcast stations in the same service	7735, 7651
Operating hours	
Discontinuation	7664
Policies of the FCC	
Time brokerage	7586
Records kept by stations	
Equal employment opportunity program	7691, 7693
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	7675, 7666 7566, 7568 7677, 7678 7684, 7686 7597, 7598

FEDERAL COMMUNICATIONS COMMISSION

Subject	Page
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	7564, 7570
Cable Television Service	
	7638
Network nonduplication protection	
Signals, priority of	7620
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	7668, 7582
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	7740, 7674
Common Carriers: Miscellaneous Rules	
Enhanced services (computer) and customer-premises equipment	7719
Communications Act of 1934	
Common Carriers	
Extension of lines, certificate for	7582, 7583
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	7691, 7693
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	7691, 7693
Licenses, limitation on holding and transfer of	7586
Sanctions, administrative	7664
Direct Broadcast Satellite Service (DBS)	
Licenses	
Authorization conditions	7576
Frequency Allocations and Radio Treaty Matters	
Allocation, assignment, and use of radio frequencies	
International and U.S. table of frequency allocations	7593, 7581
Practice and Procedure	
Application procedures, general	
Information furnished by applicants, changes in	7622

Subject	Page
Common carriers: complaints	
Formal or informal	7698
Hearing proceedings: participants and issues	
Notice of hearing and appearances	7653
Hearing proceedings: review proceedings	
Decision, appeal and review of initial	7612
Proceedings, miscellaneous	
Forfeiture proceedings	7691, 7693
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	7653
Public Mobile Service	
Transfers and assignments of applications	7624
Applications and licenses-filing requirements	
Additional channels, conditions for granting applications in	7622
Public land mobile service	
Traffic load studies, conditions requiring	7622

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
001.065 updating rules	7622
001.080 Forfeiture Provisions	7691
001.080 Forfeiture Provisions	7693
001.080 Forfeiture Provisions	7695
001.085 Suspension of operator license	7669
001.106 Petition for Reconsideration	7656
001.1107 Payment of charges	7653
001.115 application for review	7653
001.221 Notice of appearance	7653
001.276 Supplemental Briefs	7612
001.711 Formal or informal complaints	7698
002.106 Table of Frequency Allocations	7581
002.106 Table of Frequency Allocations	7593
015.109(e) Radiated emission limits:Carrier current systems	7729
015.207 Conducted limits	7729
015.221 Operation in the band 525 - 1705 kHz	7729
022.016 traffic load studies	7622
022.516 traffic load studies	7622
022.922 Transfers and assignments of applications, permits o	7624
047 C.F.R. 1.46 Motions for Extension of Time	7618
047 CFR § 64.702, Furnishing of Enhanced Services and CPE	7589
047 CFR § 64.702, Furnishing of Enhanced Services and CPE	7708
047 CFR § 64.702, Furnishing of Enhanced Services and CPE	7719
047 Section 0.291 authority delegated	7617
047 Section 0.291 Delegated Authority	7619
047 Section 000.291 authority delegated	7674
063.001 Contents of Applications	7583
063.001 Contents of Applications	7668
063.001 Contents of Applications	7710
063.001 Contents of Applications	7712
063.001 Contents of Applications	7714
063.001 Contents of Applications	7715
063.001 Contents of Applications	7716
063.01 Contents of Applications	7582
063.01 Contents of Applications	7709
067.001 General	7578
073.202	7609
073.202 FM Table of Allotments	7573
073.202 FM Table of Allotments	7574
073.202 FM Table of Allotments	7594
073.202 FM Table of Allotments	7595
073.202 FM Table of Allotments	7598
073.202 FM Table of Allotments	7602
073.202 FM Table of Allotments	7666
073.202 FM Table of Allotments	7670
073.202 FM Table of Allotments	7672
073.202 FM Table of Allotments	7677
073.202 FM Table of Allotments	7678
073.202 FM Table of Allotments	7680
073.202 FM Table of Allotments	7682

073.202 FM Table of Allotments 7684
073.202 FM Table of Allotments 7686
073.202, FM Table of Allotments 7566
073.202, FM Table of Allotments 7568
073.202, FM Table of Allotments 7597
073.202, FM Table of Allotments 7600
073.202, FM Table of Allotments 7675
073.2080 Equal Employment Opportunity 7691
073.2080 Equal Employment Opportunity 7693
073.2080 Equal Employment Opportunity 7695
073.3540 Application for voluntary assignment or transfer of 7585
073.3540 Application for voluntary assignment or transfer of 7586
073.3555 Multiple ownership 7585
073.3555 Multiple ownership 7586
073.3555 Multiple Ownership 7651
073.4267 Time Brokerage 7585
073.4267 Time Brokerage 7586
073.606 TV Table of Allotments 7564
073.606 TV Table of Allotments 7570
076.005 Definitions 7638
076.092 Network non-duplication; extent of protection 7620
097.003 Definitions 7626
097.003 Definitions 7658
097.111 Authorized transmissions 7658
097.119 Station identification 7631
097.201 Auxiliary stations 7658
097.301 Authorized frequency bands 7631
097.501 Qualifying for an amateur operator license 7631
097.505 Elements credit 7626
097.511 Technician,General,Advanced and Amateur Extra Class 7626
100.19 License conditions; due diligence 7576
300.208 Complaints to the Commission 7575
300.214 Extension of Lines 7582
300.214 Extension of Lines 7583
300.214 Extension of Lines 7668
300.214 Extension of Lines 7709
300.214 Extension of Lines 7710
300.214 Extension of Lines 7712
300.214 Extension of Lines 7714
300.214 Extension of Lines 7715
300.214 Extension of Lines 7716
300.309 Action Upon Applications 7691
300.309 Action Upon Applications 7693
300.309 Action Upon Applications 7695
300.310 Limitation on Holding and Transfer of Licenses 7585
300.310 Limitation on Holding and Transfer of Licenses 7586
300.503 Forfeitures in Cases of Rebates and Offsets 7691
300.503 Forfeitures in Cases of Rebates and Offsets 7693
300.503 Forfeitures in Cases of Rebates and Offsets 7695
300.503(b) Forfeitures 7688
300.504 Provisions Relating to Forfeitures 7691
300.504 Provisions Relating to Forfeitures 7693
300.522 Definitions 7638
400.181464 Broadcasting Obscene or Indecent Language 7688

500.100 7603
500.100 7605
500.100 7606
500.100 HDO 7608
500.100 HDO 7699
500.100 HDO 7701
500.100 HDO 7703
500.100 HDO 7705
500.2135 - real party in interest 7646
500.3045 Diversification of Control of Mass Media 7651
500.3125 Misrepresentation and Lack of Candor 7651
500.3180 Site Availability or Suitability 7651
CC Dkt No. 87-313; Changes to Parts 61, 65, and 69 7664
Formal or informal complaints 7592
LPB et al. Joint Petition for reconsideration 7729
Part 73 Radio Broadcast Services 7726
Voice and data communications; 47 Section 0.291 authority de 7616
Voice and data communications; 47 Section 0.291 authority de 7727

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-611

In the Matter of

Amendment of Section 73.606(b), RM-7533
Table of Allotments,
TV Broadcast Stations.
(Alamosa, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1990; Released: December 17, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Mountain Valley Television, Inc. ("petitioner"), seeking the allotment of UHF Channel 47 to Alamosa, Colorado, as that community's first local commercial television service. Petitioner stated its intention to apply for authority to construct and operate a television broadcast station on Channel 47, if allotted.

2. Alamosa (population 6,830),[1] the seat of Alamosa County (population 11,799), is located approximately 270 kilometers (165 miles) southwest of Denver. Noncommercial educational UHF television Channel *16, which is vacant and unapplied for, is allotted to Alamosa.

3. On July 16, 1987, the Commission instituted a temporary freeze on the filing of petitions for rule making to amend the Television Table of Allotments for certain metropolitan areas. *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, published July 29, 1987 ("freeze *Order* "). A review of petitioner's proposal reveals that Channel 47 could be allotted to Alamosa in compliance with the minimum distance separation requirements of Section 73.610 of the Commission's Rules without the imposition of a site restriction. However, because Alamosa is located within the prohibited co-channel distance separation of 174.5 miles (280.8 kilometers) from Denver, one of the major market communities affected by the freeze *Order*, the proposal requires a site restriction at least 16.7 kilometers (10.4 miles) south of the community[2] to conform with the terms of the freeze *Order*. Petitioner acknowledges the effect of the freeze on its proposal and states that the proposed transmitter for Channel 47 would be located beyond the proscribed area surrounding Denver.

4. We believe the public interest would be served by proposing the allotment of UHF Channel 47 to Alamosa as that community's first local commercial television service. Accordingly, we seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, as follows:

City	Channel No. Present	Proposed
Alamosa, Colorado	*16	*16,47

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 7, 1991,** and reply comments on or before **February 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

James S. Finerfrock, Esq.
Becker & Finerfrock, P.C.
1915 Eye Street, N.W.
Washington, D.C. 20006-2107

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are from the 1980 U.S. Census.

[2] Coordinates used for Channel 47 at Alamosa are 37-19-04 and 105-52-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-610

In the Matter of

Amendment of Section 73.202(b), RM-7547
Table of Allotments,
FM Broadcast Stations.
(Stamford, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1990; Released: December 17, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Carmine M. Iannace ("petitioner") requesting the allotment of Channel 250A to Stamford, New York, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 250A to Stamford, New York, since it could provide the community with its first local FM service. Channel 250A can be allotted to Stamford in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment is required since Stamford is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Stamford, New York	–	250A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 7, 1991,** and reply comments on or before **February 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mr. Carmine M. Iannace
239 St. John's Avenue
Yonkers, New York 10704
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 250A at Stamford are North Latitude 42-24-42 and West Longitude 74-37-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-614

In the Matter of

Amendment of Section 73.202(b), RM-7439
Table of Allotments,
FM Broadcast Stations.
(Big Spring, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1990; Released: December 17, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Ballard Broadcasting Company of Oklahoma, Inc. ("petitioner"), proposing the allotment of Channel 243C3 to Big Spring, Texas, as the community's second local FM service. Petitioner states that it will apply for this channel, if allotted.

2. Channel 243C3 can be allotted to Big Spring in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Since Big Spring, Texas, is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government has been requested.

3. In view of the fact that Big Spring, Texas, could receive its second local FM service, we believe the public interest would be served by proposing the allotment of Channel 243C3 to that community. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Big Spring, Texas	237A	237A, 243C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 7, 1991,** and reply comments on or before **February 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Joseph E. Dunne, III, Esq.
May & Dunne, Chartered
Suite 520
1000 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 243C3 at Big Spring are 32-15-00 and 101-28-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-493

In the Matter of

Amendment of Section 73.606(b),	RM-5525
Table of Allotments,	RM-5829
TV Broadcast Stations.	
(Anchorage, Palmer[1] and	
Seward, Alaska)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 29, 1990; Released: December 17, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 52 FR 3678, published February 5, 1987, issued in response to a petition for rule making filed on behalf of the University of Alaska ("petitioner"),[2] proposing the reallotment of VHF television Channel 9 from Seward to Anchorage, Alaska, and its reservation for educational use. Petitioner, the Alaska Public Broadcasting Commission ("APBC") and the City of Seward filed comments. Word of Life Fellowship ("WLF") filed comments including a counterproposal.[3] Petitioner, APBC and City of Seward filed reply comments.

2. In its comments petitioner reiterates its intention to apply for authority to construct and operate a station on Channel 9 at Anchorage, if its proposal is adopted. APBC, licensee of Station KAKM-TV (Channel *7), Anchorage, and the City of Seward each oppose the reallotment, while WLF seeks the use of Channel 9 at Palmer, Alaska.

3. APBC objects premised on the belief that petitioner has not demonstrated the need for a second noncommercial service at Anchorage. In support, APBC claims that since Station KAKM-TV (Ch. *7), currently broadcasts a substantial degree of educational programming, it believes that petitioner's intended programming will either duplicate or parallel that presently offered by it. Moreover, APBC claims that Alaska has experienced a continuous reduction in funding from the State for noncommercial educational broadcasting over the past few years. As a result, APBC alleges that monies allocated on the State or Federal level must be utilized conservatively in order to maintain existing service, as well as to expand public broadcasting into unserved areas. Therefore, APBC is concerned that if Channel 9 is reallocated to Anchorage, the two noncommercial operators would be forced to compete intensely for funds from the viewing public. APBC believes that sort of competition could be devastating.

4. The City of Seward opposes the proposal since Channel 9 is currently used at Seward by a translator (09DL), rebroadcasting the signal of Station KTUU-TV (Channel 2), an NBC affiliate, from Anchorage. Further, it claims that although the *Notice* indicated the possibility that Channel 3 in Seward could be used as a substitute for Channel 9, if deleted, such change could pose problems since that channel is used to transmit the State of Alaska satellite programming (RATNET). Also, the City of Seward advises that Channel 7 is used at Seward to deliver Station WGN from Chicago, Illinois.

5. WLF seeks the reallocation of Channel 9 from Seward to Palmer, (population 2,141),[4] as its first local television service, for commercial use. In support, WLF advises that Palmer is approximately 40 road miles east of Anchorage, separated from it by a body of ocean water and connected by a narrow strip of land. Moreover, WLF claims that due to the intervening mountainous terrain, over-the-air reception of Anchorage television signals in Palmer is poor. In this regard, WLF asserts that two of three network affiliated stations located in Anchorage do not provide a Grade B signal over Palmer, while no reception is provided a few miles to the north and west. Therefore, WLF alleges that since Palmer is underserved, it should be preferred in order to provide its residents with a first local television service to address their specific needs and interests.

6. Petitioner disputes APBC's claim that Anchorage does not need another noncommercial educational station, and that such an operation, if approved, would merely duplicate programming broadcast by Station KAKM(TV). Petitioner advises that while it produces substantial amounts of educational programming that is presently broadcast over Station KAKM(TV), and carried on a local cable channel as well, its ability to meet the demand for such programming is constrained by the limited broadcast time it receives, coupled with limited cable penetration in the market.

7. Additionally, petitioner comments that APBC's claim of economic harm to its Station KAKM(TV) is misplaced here since the proper forum to consider such argument would be in the context of an individual application.

8. In response to the City of Seward's opposition, petitioner advises that on the basis of its engineering study, it is unlikely that a Channel 9 facility operating in Anchorage would interfere with the Seward translator since the communities are 128 road miles apart and separated by mountainous terrain. Moreover, petitioner claims that there are numerous other channels which Seward could use in lieu of Channel 9 for its translator. Finally, petitioner avers that Section 74.702(b) of the Commission's Rules considers translators as a secondary service. Therefore, petitioner argues, the City of Seward's use of Channel 9 at Seward cannot be protected from its request to use Channel 9 as a full service television operation in Anchorage.

9. With regard to the WLF counterproposal, petitioner advises that Palmer is a part of the Matanuska-Susitna Borough, which it reports, is adjacent to the Municipality of Anchorage. As such, petitioner advises that the Commission has consistently held that large central cities and their adjoining suburbs are equivalent for Section 307(b) purposes for wide-area services such as television, citing *Cleveland Television Corp.*, 52 RR 2d 581 (Rev. Bd. 1982); *St. Louis Telecast, Inc.*, 22 FCC 625 (1957); *Huntington Broadcasting Co.*, 14 FCC 563 (1950), *aff'd*, 192 F.2d 33 (D.C. Cir. 1951), and thus there is no reason to distinguish between a central city and its suburb. According to petitioner, Palmer is a suburb of Anchorage, and is de-

pendent on it as a commercial center and source of employment for its economic base. Therefore, petitioner avers that regardless of which community Channel 9 is allotted to, a local station would direct its service to the larger market. Thus, petitioner believes there is a greater need for the use of Channel 9 at Anchorage as a second noncommercial allotment than there is for its use as a commercial allotment to the smaller community of Palmer.

10. Additionally, petitioner claims that WLF's implication that Palmer is isolated from Anchorage is misleading. Petitioner advises that the "narrow strip of land" which WLF describes as connecting the two communities is the major artery used by many Matanuska area commuters whose jobs are in Anchorage.

11. Furthermore, petitioner asserts that WLF has not fully portrayed the extent of existing reception service in Palmer. Although WLF reported that two Anchorage network affiliates operating on Channels 11 and 13 do not provide a Grade B contour over Palmer, according to petitioner, the Channel 13 licensee is part of a joint co-venturer with Channels 2 and 7 that has constructed a tower in the Goose Bay area from which it will be able to provide such service. Moreover, petitioner advises that Channels 2 and 7 presently provide Grade A service to Palmer. Petitioner adds that a maximum facility operation on proposed Channel 9 at its intended site could also provide city-grade service to Palmer. Petitioner urges that technical facilities on Channel 9 would be identical, regardless of the community to which it is allotted. However, in order to satisfy WLF's desire to provide local service to Palmer, petitioner claims there are numerous UHF channels available for allotment to the community.

12. APBC's reply comments reiterate its concern regarding the economic viability of the proposed reallotment. In the event the need for a second noncommercial service and funding for it are demonstrated, APBC asserts there are UHF channels available to Anchorage to accommodate petitioner's proposal. Additionally, APBC acknowledges that although the use of Channel 9 at Seward as a translator must yield to its use as a full service station, in view of the bleak economic picture it has portrayed for educational facilities in Alaska, there appears to be no need to disrupt Seward's present use of the channel.

13. The City of Seward also objects to WLF's request to reallot Channel 9 to Palmer, premised on the fact that that channel has been used for over 20 years to provide programming via a translator to the citizens of Seward. It claims that WLF has failed to provide any justifiable reason to disrupt its operation. In support of its retention, the City of Seward reiterates that not only is Channel 9 used to translate programming from Anchorage, but that it also provides an opportunity for Seward to attract a local television station. City asserts that rather than entertain the use of Channel 9 at either Anchorage or Palmer, there are UHF channels available to satisfy both proposals.

14. Initially, we turn to APBC's argument that a second noncommercial station would cause economic harm to Station KAKM(TV), Channel *7. Not only is that allegation unsupported, it is not a valid consideration at the rule making stage or at the application stage.[5] *See, Anchorage, AK*, 48 FR 34959 (1983); *Hagerstown, MD*, 52 RR 2d 1476 (1982); *Sanger, Clovis, Visalia and Fresno, CA*, 49 RR 2d 579 (1981); *Hay Springs, NE*, 42 RR 2d 1673 (1978); and *Grand Junction, CO*, 26 RR 2d 513 (1973). Furthermore, the Commission has historically sought to reserve approximately twenty-five percent of television channels for noncommercial use. *See Sixth Report and Order on Television Allotments*, 41 FCC 148, 166 (1952). Anchorage, with six commercial channels and only one noncommercial channel, should, consistent with this guideline, have one additional noncommercial educational allotment.

15. With regard to the issues raised by the City of Seward, as petitioner correctly notes, the City of Seward is not entitled to protection for its use of Channel 9 as a translator operation in Seward. The Commission has consistently treated such operation as a secondary service for purposes of spectrum priority. Accordingly, existing and new full service television stations are afforded protection from interference from secondary facilities.[6] Section 74.702(b) of the Commission's Rules provides that changes in the existing Television Table of Allotments may be made without regard to existing or proposed television translator stations.

16. In consideration of the significantly smaller population of Palmer (pop. 2,141),[7] and its environs, in conjunction with its close proximity to Anchorage (pop. 239,500), we believe that if the channel were allotted there, it would inevitably serve the substantially larger Anchorage market. Awarding a preference in these circumstances would appear to condone an artificial and unwarranted manipulation of the Commission's policies. This conclusion is premised on the detailed information supplied in this proceeding to demonstrate the interdependence of the Matanuska-Susitna Borough, in which Palmer is located, upon Anchorage as a commercial center and source of employment. Thus, since Palmer is extremely small and is closely associated with Anchorage, we ascribe minimal weight to the fact that an allotment at Palmer would provide a first local service. Therefore, and on the basis of the information presented, we believe that petitioner has demonstrated a greater need for Channel 9 as a second local noncommercial educational television allotment to Anchorage, than its use for commercial purposes to the smaller, contiguous community of Palmer. Moreover, since UHF channels are available to Palmer, we believe our determination is consistent with the Commission's general allotment scheme, which generally focused on allotment of VHF channels to core cities of metropolitan areas. *See, Sixth Report and Order on Television Allotments*, 41 FCC 148 at 168 (1952). Additionally, we view our determination as constituting a more efficient use of the frequency since Channel 9 has been unapplied for at Seward for over twenty years, and Channel 3 remains available for a full service television station should a demand develop.

17. The City of Seward's translator operation may continue on Channel 9, provided it does not cause interference to any full service television operation. *See, Keyser, WV, supra*, and *Altus, OK, supra*.

18. In consideration of the above, we will reallot VHF television Channel 9 from Seward to Anchorage, and reserve it for educational use since it could provide a second local voice to the community for the presentation of noncommercial educational programming. As indicated in the *Notice*, Channel 9 can be reallotted to Anchorage in conformity with the minimum distance separation requirements of Section 73.610 of the Commission's Rules.[8] Although the Commission recently imposed a freeze on

television allotments, or applications therefor, in certain metropolitan areas.[9] Anchorage is not within the prohibited co-channel distance to any specified areas.[10]

19. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 31, 1991,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Anchorage, Alaska	2-,4-,5,*7-,*9, 11,13-,33
Seward, Alaska	3-

20. IT IS FURTHER ORDERED, That the petition for rule making filed on behalf of Word of Life Fellowship (RM-5829), IS DENIED.

21. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

22. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] Petitioner is the licensee of noncommercial educational Station KUAC-TV, Channel *9, Fairbanks, Alaska.

[3] Public Notice of the counterproposal was given April 7, 1987 (Report No. 1652).

[4] Petitioner supplied a population figure of 3,116, which is reportedly the 1986 total. However, petitioner did not identify its reference source. Therefore, we have used the 1980 U.S. Census as our official reference.

[5] In this regard, it should be noted that the Commission has abolished the *Carroll* doctrine with respect to the possible economic harm to existing stations that might be caused by the entry of new full service stations. *See Report and Policy Statement,* 3 FCC Rcd 638 (1988).

[6] *See, Keyser,* WV, 51 FR 12703 (1986) and *Altus, OK,* 50 FR 43713 (1985).

[7] Population figure was taken from the 1980 U.S. Census.

[8] Reference coordinates used in this determination are those of the city reference point at 61-13-06 and 149-53-30.

[9] *See, Order,* 52 FR 28346 (1987).

[10] *See* Section 73.610 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-548

In the Matter of

Amendment of Section 73.202(b), RM-7017
Table of Allotments,
FM Broadcast Stations.
(Clintonville, New Holstein
and Wautoma, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 29, 1990; Released: December 17, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 8642 (1989), proposing the substitution of FM Channel 222C3 for Channel 221A at Clintonville, Wisconsin. The *Notice* was issued in response to a petition filed by Sail Communications Corporation ("petitioner"). Late filed comments and reply comments were submitted by petitioner.[1]

2. The *Notice* proposed the substitution of Channel 222C3 for Channel 221A at Clintonville, Wisconsin, and modification of the license for Station WJMQ(FM) to specify the higher class channel. In order to accomplish the upgrade at Clintonville, petitioner requested the substitution of Channel 225A for Channel 226A at New Holstein, Wisconsin, and modification of the construction permit for Station KFKQ(FM), New Holstein, to reflect the new channel,[2] and the substitution of Channel 226A for vacant but applied for Channel 222A at Wautoma, Wisconsin. [3]

3. The *Notice* stated that in the event of a modification of Station WJMQ(FM), petitioner would be required to reimburse Station KFKQ(FM), New Holstein, for the reasonable costs involved in changing its frequency. *See Circleville, Ohio*, 8 FCC 2d 159 (1967), and *Dickerson, Tennessee, and Benton and Calvert City, Kentucky*, 4 FCC Rcd 8707 (1989). We noted that petitioner should indicate its willingness to reimburse Station KFKQ(FM) in the event the modification was granted at Clintonville. Petitioner has made no reference to reimbursement in its comments or reply comments. Therefore, its proposal will not be adopted. This action does not reflect our views regarding the desirability of providing Clintonville with an expanded service FM station.[4]

4. In view of the foregoing, IT IS ORDERED, That the petition of Sail Communication Corporation proposing the substitution of Channel 222C3 for Channel 221A, Clintonville, Wisconsin, and modification of the license for Station WJWQ(FM), the substitution of Channel 225A for Channel 226A, New Holstein, Wisconsin, and modification of the license for Station KFKQ(FM), and the substitution of Channel 226A for vacant Channel 222A, Wautoma, Wisconsin, IS HEREBY DISMISSED.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order* to the following:

Frederick W. Kinlaw/
F.W.K. Broadcasting Co.
W-238, S-6825 Hwy. F
Waukeska, Wisconsin 53186

Wautoma Radio Company
981 Howard Street
Green Bay, Wisconsin 54303

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's comments and reply comments were received after the cut-off dates established in this proceeding and were not accompanied by a motion to accept. However, because this proceeding is uncontested, we will accept the comments and reply comments.

[2] Frederick W. Kinlow/F.W.R. Broadcasting Co., permittee of Station KFKQ(FM), did not respond to the *Order to Show Cause* directing him to demonstrate why his permit should not be modified to specify operation on Channel 225A in lieu of Channel 226A.

[3] The sole applicant is Wautoma Radio Company (File No. BPH-880421NZ).

[4] Petitioner may resubmit its proposal provided that it indicate its willingness to reimburse any affected permittee or licensee for the reasonable costs involved in changing its frequency. Alternatively, petitioner may wish to determine if it can achieve its upgrade on another channel that would not require a change in channel for any existing stations, and submit a new petition for rule making.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-404

In the Matter of

Amendment of Section 73.202(b), RM-7277
Table of Allotments,
FM Broadcast Stations.
(Park Falls, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 29, 1990; Released: December 17, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5392 (1990), proposing the substitution of FM Channel 254C2 for Channel 252A at Park Falls, Wisconsin, and modification of the license for Station WNBI-FM to specify the new channel. The *Notice* was issued in response to a petition filed by Northland Broadcasting, Inc. (petitioner). Petitioner filed comments reaffirming its interest in the channel. No other comments were received.

2. We believe the public interest would be served by substituting Channel 254C2 for Channel 252A at Park Falls, Wisconsin, because this would provide the community with an enhanced FM broadcast service. As indicated in the *Notice*, Channel 254C2 can be allotted to Park Falls, Wisconsin, consistent with the Commission's spacing requirements at petitioner's specified site 10.4 kilometers (6.5 miles) southeast of the community.[1] Since Park Falls is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained. We have authorized a modification of petitioner's license for Station WNBI-FM, Park Falls, to specify operation on Channel 254C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 31, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Park Falls, Wisconsin	254C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WNBI-FM, Park Falls, Wisconsin, IS MODIFIED to specify operation on Channel 254C2, in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 254C2 are 45-50-52 and 90-24-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File Nos. E-90-05, E-90-07, E-90-21, E-90-25, and E-90-27

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC., AND THE MAJOR PARTICIPANTS IN ITS 1988 CARRIER COMMON LINE POOL
Defendants.

ORDER

Adopted: December 7, 1990; Released: December 17, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1989, AT&T Communications (AT&T) filed the above-captioned complaints against the National Exchange Carrier Association, Inc. ("NECA"), alleging that the NECA carrier common line rate for 1988 was unjust and unreasonable in violation of 47 U.S.C. § 201(b). These actions were filed by AT&T as companion proceedings to complaints against certain local exchange carriers ("LECs") that participated in NECA's Carrier Common Line pool.

2. On December 5, 1990, AT&T filed a motion to dismiss these complaints with prejudice. AT&T states that as a result of discussions between the parties, the companion complaints have been dismissed by the Commission.[1] Therefore, AT&T concludes that no purpose would be served by the continued pendency of the proceedings against NECA.

3. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R.§ 0.291, that the request for dismissal of the above-captioned complaints IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] AT&T Communications v. Mountain States Tel. & Tel. Co., 5 FCC Rcd 2520 (1990); AT&T Communications v. Southern Bell Tel. & Tel. Co., 5 FCC Rcd 6559 (1990); AT&T Communications v. Cincinnati Bell Telephone Co., 5 FCC Rcd 5497 (1990); AT&T Communications v. Contel of California, Inc., 5 FCC Rcd 4098 (1990); AT&T Communications v. Central Telephone Co. of Florida, 5 FCC Rcd 4099 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

United States Satellite Broadcasting Company, Inc.
File No. DBS-81-07/84-07/88-06MP
DBS-81-07/88-06MP/MINOR

For Modification of Construction Permit for Direct Broadcast Satellite System

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1990; Released: December 17, 1990

By the Commission:

1. In *RCA American Communications, Inc.*, Mimeo No. 7115, adopted September 17, 1985, released September 19, 1985 (Mass Media Bureau) (*"RCA American"*), United States Satellite Broadcasting Company, Inc. ("USSB"), was authorized to construct and launch two 8-channel satellites to provide eight channels of Direct Broadcast Satellite ("DBS") service to the eastern half of the continental United States from channels 18, 20, 22, 24, 26, 28, 30 and 32 at orbital position 110°W, and eight channels of DBS service to the western half of the continental United States from channels 18, 20, 22, 24, 26, 28, 30 and 32 at orbital position 148°W.[1] In *Continental Satellite Corporation*, 4 FCC Rcd 6292, 6297, 6301 (1989), the Commission granted USSB's application to modify its construction permit to authorize USSB to deliver 8 channels of full-CONUS service from its first satellite, to be located at 110°W, until such time as its second satellite, at 148°W, becomes operational.[2] At that time, USSB's 148°W satellite will commence providing western half-CONUS service, and its 110°W satellite will be switched to eastern half-CONUS service.

2. On February 21, 1990, USSB filed an application to modify its authorization to substitute channels 23, 25, 27, 29 and 31 at orbital position 101°W for its currently authorized channels 18, 20, 22, 24 and 26 at orbital position 110°W. USSB wishes to retain its authorization to operate on channels 28, 30 and 32 at orbital position 110°W, as well as all of its currently authorized channels at 148°W.

3. This request is a minor change because the proposed modification does not entail the use of any additional orbit/spectrum resources. *Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 FCC 2d 250, 252 (1983). However, before specific orbit and channel assignments can be made, the applicant must demonstrate "due diligence" in initiating the construction of its system. *Id.* at 253. The due diligence requirement, which is set forth in Section 100.19(b) of the Commission's Rules, 47 C.F.R. 100.19(b), provides, in pertinent part, that the DBS permittee must begin construction or complete contracting for the construction of its satellite(s) within one year of the grant of its construction permit. USSB has previously satisfied the due diligence requirement with regard to two 8-channel satellites by demonstrating that it had completed contracting for their construction. *RCA American, supra.* However, the instant modification requested by USSB will require three satellites. Accordingly, it is necessary for USSB to demonstrate due diligence with regard to the third satellite before its modification may be granted.

4. In a separate filing on February 21, 1990, USSB states that it has entered into a contract with G.E. Astro-Space Division ("G.E. Astro-Space") to acquire a 3-channel satellite to provide DBS service on the three channels USSB wishes to retain at 110°W, and that it has made an initial payment provided for in the contract for this additional satellite. On July 20, 1990, USSB filed further information regarding the contract terms for the third satellite, including a payment schedule and construction milestone schedule. Included in USSB's July 20, 1990 filing is a letter dated March 2, 1990, from Mr. Jim Warner, manager of financial control for commercial communications programs of G.E. Astro-Space, which verifies the existence and details of the February 21, 1990 contract for the third satellite. This showing satisfies the due diligence requirement of Section 100.19(b) of the Commission's Rules. *Tempo Enterprises, Inc.*, 1 FCC Rcd. 20, 21 (1986); *United States Satellite Broadcasting Company, Inc.*, 3 FCC Rcd. 6858, 6861, 6862 n.20 (1988).

5. Until this time, uncertainties regarding the assignment of specific channels and orbital positions have precluded DBS permittees from making the detailed engineering showings necessary to demonstrate compliance with applicable international treaties. The assignment of specific channels and orbital positions to USSB in this Order has resolved that uncertainty for USSB. Accordingly, in order to issue a revised construction permit and ensure that international coordination is initiated in a timely fashion, USSB is directed to supply, within thirty (30) days of the release of this Order, updated technical information for each space station. This information should include the "Basic Characteristics to be Furnished in Notices Relating to Space Stations in the Broadcasting-Satellite Service," contained in Annex 2 of Appendix 30 of the International Telecommunication Union (ITU) Radio Regulations. Appropriate calculations should be supplied to demonstrate compliance with paragraphs 1 through 8 of Annex 1 of Appendix 30, as applicable. Particular attention should be paid to shaped beam contours to ensure that they are of sufficient detail to permit verification of all necessary calculations. As a guideline, see paragraph 12(h) of Annex 2. Finally, USSB should provide a detailed description of any technical characteristics to be utilized which differ from those assumed for international planning purposes, *e.g.*, the use of digital compression techniques. In this regard, USSB should provide an analysis demonstrating that such deviations do not cause more interference or require more protection than the assumptions used for planning purposes. The Commission may, upon further analysis, impose whatever conditions or limitations it determines to be necessary in order to ensure compliance with applicable international provisions when the cumulative effects of various proposals are considered. This is particularly so with regard to multi-operator use of full-CONUS service beams from the four easternmost orbital positions.

6. Accordingly, IT IS ORDERED, That USSB's modification request IS GRANTED, on the conditions (a) that USSB submits, within thirty (30) days of the release of this Order, the updated technical information described in paragraph 5 of this Order; and (b) that USSB's authorization may be modified or rescinded if analysis of updated technical information indicates that such service would violate the interference parameters of the Region 2 Plan, or other international treaties or agreements. The grant of USSB's modification application in this Order does not include launch and/or operational authority for any phase of USSB's modified proposal. Upon receipt and analysis of the updated technical information specified in paragraph 5 of this Order, the Mass Media Bureau will send under separate cover an instrument of authorization, including launch authority, assigning to USSB DBS channels 23, 25, 27, 29 and 31 at orbital position 101^0W; channels 28, 30 and 32 at orbital position 110^0W; and channels 18, 20, 22, 24, 26, 28, 30 and 32 at orbital position 148^0W.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Signals from DBS satellites which cover half of the continental United States are referred to as "half-CONUS" signals; those which cover the entire continental United States are referred to as "full-CONUS" signals.

[2] Four of the domestic DBS orbital positions, 61.5^0W, 101^0W, 110^0W and 119^0W, may be technically suitable for delivering full-CONUS DBS service. The Commission conditionally authorized full-CONUS signals from these orbital positions pending final confirmation of their compliance with the United States' obligations under international treaties and agreements. *Id.* at 6294, 6300-01. *See* paragraph 5, *infra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of
the Commission's Rules and
Establishment of a Joint Board

RECOMMENDED DECISION AND ORDER

Adopted: November 15, 1990; Released: December 17, 1990

By the Federal-State Joint Board:

I. INTRODUCTION

1. This Federal-State Joint Board hereby presents its recommendations concerning the procedures used by the National Exchange Carrier Association (NECA) to calculate study area unseparated loop costs for the purpose of determining the level of the Universal Service Fund (USF) pursuant to Part 36, Subpart F, of the Commission's Rules.

2. On November 22, 1988, the Federal Communications Commission (FCC) released a Notice of Proposed Rule Making (*NPRM*) [1] seeking comment on the manner in which NECA allocates Corporate Operations Expenses and Operating Taxes between loop and nonloop costs to determine the amount of such costs attributable to loop facilities in individual study areas. The FCC proposed to amend the separations rules to require NECA to use gross investment as the basis of allocation for Corporate Operations Expenses, while retaining net investment as the basis of allocation for Operating Taxes. For the reasons set forth below, we recommend that gross investment serve as the basis of allocation for both of these costs.

II. BACKGROUND

3. The FCC established the USF to protect telephone subscribers in areas with unusually high local exchange costs and thereby promote the nationwide availability of telephone service at reasonable rates.[2] For this purpose, the USF provides an additional interstate allocation for study areas in which the unseparated average loop cost exceeds the national average by 115 percent or more.

4. NECA determines which study areas are eligible for USF assistance. Using data submitted annually by local exchange carriers (LECs), NECA computes a jurisdictionally unseparated average loop cost for individual study areas and for the LEC industry as a whole. By incorporating these averages into a prescribed formula, [3] NECA calculates the additional cost amounts, *i.e.*, expense adjustments, that eligible study areas allocate to the interstate jurisdiction.

5. To ensure that loop-related overhead costs and taxes are properly reflected in the formula, the rules require NECA to include a portion of unseparated Corporate Operations Expenses and Operating Taxes in the calculation of average loop cost. The rules specify that this portion is to be determined by allocating these expenses and taxes between loop and nonloop costs based on the loop/nonloop apportionment of net investment.

6. On July 2, 1987, NECA requested a waiver of the FCC's rules to permit it to modify this allocation procedure by using gross investment instead of net investment as the basis of allocation for these overhead costs and taxes. The Common Carrier Bureau granted NECA's waiver request on a limited basis through December 31, 1988.[4]

7. On November 22, 1988, the FCC released the *NPRM*, in which the FCC extended this waiver until the issue is resolved; referred the issue to this Joint Board for a recommendation; and proposed a rule amendment. Specifically, the FCC proposed that NECA be required to allocate Corporate Operations Expenses based on gross investment rather than net investment but continue to allocate Operating Taxes based on net investment.

8. The FCC invited comment on this proposal and on NECA's claim that, because net investment excludes depreciation reserves, the use of net investment as the basis of allocation is advantageous to larger, high growth companies but disadvantageous to smaller, high cost companies. In response to the *NPRM*, seven parties[5] filed comments and one party, GTE, filed reply comments.

III. SUMMARY OF COMMENTS

9. *Widespread support for gross investment methodology.* All parties support the FCC's proposal to allocate Corporate Operations Expenses based on gross investment. They all oppose, however, the FCC's proposal to allocate Operating Taxes based on net investment. With the exception of GTE, the commenters believe that the allocation of Operating Taxes, similar to that of Corporate Operations Expenses, should be based solely on gross investment.

10. These parties generally contend that a gross investment methodology is more consistent with the FCC's traditional jurisdictional allocation procedures. SW Bell, for example, observes that gross investment is employed throughout the separations rules as the appropriate measure of telephone plant in service. SW Bell also observes that the rules prescribe gross investment as the basis of allocation for all plant non-specific expenses except access expense, all plant related expenses and several major investment accounts.[6]

11. These parties also generally contend that the use of net investment as an allocation factor for either of these costs would likely produce anomalous results. They believe this methodology would likely skew the allocation in favor of high growth areas at the expense of high cost areas, thereby undermining the goals the USF was designed to achieve.[7]

12. This may occur, they argue, because net investment is more strongly affected than gross investment by regulatory and business decisions pertaining to depreciation, amortization, equipment life, and salvage estimation. GTE and SW Bell, for example, claim such decisions are made inconsistently by the various state regulatory commissions

and the LECs.[8] This inconsistency, SW Bell states, causes net investment to be less reliable than gross investment as an indicator of a LEC's size. Several parties object to the use of net investment because they believe it would be disadvantageous to the smaller carriers having high costs.[9]

13. *GTE's proposed bifurcated treatment of Operating Taxes.* GTE proposes that the property-based portion of Operating Taxes be allocated based on gross investment and that the income-based portion be allocated based on net investment. GTE believes that, compared to a single-factor methodology, this bifurcated methodology is more consistent with the manner in which Operating Taxes are separated between the state and interstate jurisdictions.[10]

14. GTE nonetheless concedes, in response to the comments of other parties, that any change from the current interim procedure entails some risk of adversely affecting the smaller LECs. It therefore urges the FCC to retain the interim procedure under waiver until there is more data on which to base judicious action. GTE states that, if an analysis of the new data shows that its bifurcated proposal would have an adverse effect on the smaller LECs, it will support the use of gross investment as the sole basis of allocation for Operating Taxes.[11]

15. *Impact of NPRM proposal on USF support.* NECA estimates that the industry's total USF adjustment amount at the 1989 transition step would change by only eleven one-hundredths of one percent if the methodology proposed in the *NPRM* were substituted for the interim procedure that NECA is currently using under waiver. This estimate, NECA states, is based on its analysis of 1987 USF data submitted to it in June 1988.

16. Specifically, NECA estimates that the proposed allocation method would increase the total USF from $249,823,191 to $250,050,474. It further estimates that, of the 676 companies receiving assistance at the 1989 transition step, 167 companies would receive more while 509 companies would receive less under the *NPRM* proposal. NECA states that, although the overall impact on the industry would likely be minimal, virtually every study area qualifying for USF assistance would experience some change in the amount received.[12]

17. *Requestfor further study.* OPASTCO, SW Bell, and USTA urge the FCC to amend the rules to make the interim procedure permanent.[13] NTCA and Pacific Bell agree but request that, if the FCC intends to adopt a procedure other than the interim procedure, it defer its decision until such time that an analysis determines the potential impact of the alternative procedure, together with the actual impact of the accounting and separations rule changes implemented in 1988 and 1989, on the level of USF support.[14] Similarly, GTE and NECA request that, until such an analysis is complete, the FCC make no permanent change to the rules but, instead, permit NECA to continue using the interim procedure under waiver.[15]

IV. DISCUSSION

18. *Treatment of Corporate Operations Expenses.* We agree that the allocation of Corporate Operations Expenses better reflects cost causation when it is based on gross investment rather than net investment. The former basis, unlike the latter, is insensitive to depreciation reserve levels. This insensitivity is desirable because depreciation reserve levels are affected by factors, such as salvage estimates and equipment life, that are generally unrelated to the level of Corporate Operations Expenses. We therefore recommend that the rules be amended to make the interim procedure for allocating these expenses permanent.

19. *Treatment of Operating Taxes.* Income-based Operating Taxes are affected by depreciation reserve levels because income represents the rate of return on net investment. Other Operating Taxes consist essentially of property and gross receipts taxes, neither of which is directly affected by depreciation reserve levels nor is closely related to income.[16] We therefore agree with GTE that the allocation results would likely be more precise if the income-based taxes were allocated based on net investment while the other taxes continued to be allocated based on gross investment.

20. As the 1988 NECA study shows, however, the substitution of net investment for gross investment as the basis of allocation for Operating Taxes has only a minimal effect on the overall amount of USF support. We note that this finding has subsequently been supported by the results of a 1989 industry task force analysis, based on 1988 end-of-year cost data.[17] This analysis shows that such a change would decrease the total amount of assistance by less than 0.1 percent.[18]

21. We therefore believe any greater precision that might result from using a net investment methodology to allocate the income-based portion of such taxes, as proposed by GTE, or to allocate the full amount of such taxes, as proposed in the *NPRM*, would be too small to warrant the added complexity of using both net and gross factors to allocate overhead costs.

22. Under GTE's proposal, Class B carriers (carriers with annual operating revenue of less than $100 million) would have to disaggregate Operating Taxes between those that are income based and those that are not. The FCC's accounting rules do not require Class B carriers to disaggregate these taxes.[19] Hence, to obtain a marginal improvement in accuracy, GTE's proposal would impose on the smaller carriers a requirement that the FCC avoided when it adopted the accounting rules to lessen the administrative burden on such carriers.

23. We believe that, because USF assistance is provided in the form of an adjustment to separated expenses, and because gross investment is the general plant factor used to jurisdictionally separate the expenses, it is appropriate that this same plant factor be used to allocate Operating Taxes between loop and nonloop operations. Both the expenses and the adjustments to these expenses should be developed consistently using the same allocation factor absent a compelling reason to do otherwise.

24. We therefore conclude that Operating Taxes, similar to Corporate Operations Expenses, should be fully allocated based on gross investment, the approach favored by all parties other than GTE. Accordingly, we recommend that the FCC revise the rules to adopt the interim procedure.

V. ORDERING CLAUSE

25. Accordingly, this Joint Board RECOMMENDS, That the Federal Communications Commission adopt the proposals presented herein and the suggested revisions of Part 36 of the Commission's rules contained in the Appendix below. This recommendation is adopted pursuant

to Sections 4(i) and (j), 201-205, 221(c) and 410 of the Communications Act of 1934, as amended, 47 U.S.C. Secs. 154(i) and (j), 201-205, 221(c) and 410.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOR THE FEDERAL-STATE JOINT BOARD

APPENDIX

Part 36 of Title 47 of the Code of Federal Regulations is recommended to be amended to read as follows:

1. The authority citation for Part 36 continues to read:

Authority: 47 U.S.C. Secs. 151, 154(i) and (j), 205, 221(c), 403 and 410.

2. The title of Subpart F is recommended to be revised to read as follows:

Subpart F -- Universal Service Fund

3. Sec. 36.601 is recommended to be amended by revising paragraph (a) to read as follows:

Sec. 36.601 General

(a) The Universal Service Fund is derived from an expense adjustment that shall be computed in accordance with this Subpart F. This adjustment shall be added to interstate expenses and deducted from state expenses after expenses and taxes have been apportioned pursuant to Subpart D.

* * * * *

4. Sec. 36.621 is recommended to be amended by revising the title and paragraphs (a) and (a)(4) to read as follows:

Sec. 36.621 Study Area Total Unseparated Loop Cost

(a) For the purpose of calculating the expense adjustment, the study area total unseparated loop cost equals the sum of the following:

* * * * *

(4) Corporate Operations Expenses, Operating Taxes and the benefits and rent portions of operating expenses, as reported in §36.611(a)(5) attributable to investment in C&WF Category 1.3 and COE Category 4.13. To calculate the amount of these expenses and taxes that is attributable to exchange operations, multiply the total amount of such costs by the ratio of the unseparated gross exchange plant investment in C&WF Category 1.3 and COE Category 4.13, as reported in §36.611(a)(1), to the unseparated gross telecommunications plant investment, as reported in §36.611(a)(6).

5. The title of Sec. 36.622 is recommended to be revised to read as follows:

Sec. 36.622 National and Study Area Average Unseparated Loop Costs

FOOTNOTES

[1] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, *Notice of Proposed Rule Making*, 3 FCC Rcd 6767 (1988).

[2] *See generally*, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 96 FCC 2d 781 (1984).

[3] *See* 47 C.F.R. §36.631.

[4] *See* National Exchange Carrier Association, Inc., Petition for Waiver of Sections 67.621(a)(4) and 36.621(a)(4) of the Commission's Rules, 3 FCC Rcd 1023 (1988).

[5] These parties are GTE Telephone Companies (GTE), Pacific Bell, National Telephone Cooperative Association (NTCA), National Exchange Carrier Association, Inc. (NECA), Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), Southwestern Bell Telephone Company (SW Bell), and United States Telephone Association (USTA).

[6] SW Bell identifies the expense and investment accounts that are allocated based on gross investment. *See* Comments of SW Bell at 3.

[7] *See, e.g.*, Comments of NECA at 2 and OPASTCO at 3.

[8] Comments of GTE at 2-3 and SW Bell at 3.

[9] *See* Comments of NTCA at 4, OPASTCO at 3, Pacific Bell at 1, and SW Bell at 3.

[10] Comments of GTE at 3-6.

[11] Reply Comments of GTE at 2-4.

[12] Comments of NECA at 3.

[13] Comments of OPASTCO at 4, SW Bell at 4, and USTA at 3.

[14] Comments of NTCA at 3 and Pacific Bell at 2.

[15] Comments of NECA at 4-5 and Reply Comments of GTE at 2-4. In a separate proceeding, the FCC considered whether retargeting is warranted due to any unanticipated impacts that its many recent changes to the accounting and jurisdictional separations rules may have had on the USF program. The FCC concluded, primarily based on the results of a 1989 industry task force study, that no unanticipated impacts have occurred and that retargeting, whether achieved through a waiver or Rule Making process, is unnecessary. *See* National Exchange Carrier Association, Inc., *et al.*, Joint Petition for Waiver of Sections 36.611(a), 36.631(c) and 36.641(b)(3) of the Commission's Rules, AAD 9-1936, *Order*, 5 FCC Rcd 173 (1990).

[16] In general, gross receipts taxes are directly related to revenue requirements which, although they include a return on net investment, consist predominantly of operating expenses that are related to gross investment.

[17] *See* Report of Industry Task Force on Universal Service Fund (*Task Force Report*). This report was filed in AAD 9-1936 on September 1, 1989. The *Task Force Report* identifies the twenty-one industry representatives constituting the task force at note 2.

[18] *See* Appendix 1 of the *Task Force Report*.

[19] *See* 47 C.F.R. §32.7200.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Emerald Enterprises, Inc.	File No. 760317 90049
Klondike Data Systems, Inc.	File No. 760318 90048
Donna Rhyner	File No. 760417 90050

For waiver of Footnote NG47 of Section 2.106 of the Rules

WAIVER

Adopted: December 5, 1990; Released: December 18, 1990

By the Chief Engineer and Chief, Private Radio Bureau:

1. Emerald Enterprises, Inc., Klondike Data Systems, Inc., and Donna Rhyner (collectively "applicants") all seek waiver of Section 2.106, Footnote NG47 of the Commission's Rules, 47 C.F.R. § 2.106, Footnote NG47. Footnote NG47 prohibits the use of frequencies within the 2655-2690 band by terrestrial stations in Alaska to protect users in the Fixed-Satellite Service (FSS). The applicants, however, seek the use of these frequencies for Private Operational Fixed Microwave Service (OFS) distribution of video and audio entertainment signals.

2. The 2655-2690 MHz band has been reserved for the Fixed-Satellite Service for earth-to-space communications in Alaska since 1973. Section 2.106, Footnote NG102. *See, also, Report and Order in Docket No. 19547*, 39 FCC 2d 959 (1973). Since that time, the applicants observe, these frequencies have remained unused in Alaska for their intended purpose. They note, in this regard, that the most recent application for the use of these frequencies in Alaska was filed more than 10 years ago, and that all such applications have been abandoned because the band is too limited for current Fixed-Satellite Service purposes. The applicants, therefore, propose to implement OFS H-Channel systems to distribute video and audio entertainment material to their customers, who are eligibles under Part 94 of the Rules. Each nonetheless states that, should another party apply for and receive a grant to use the 2655-2690 MHz band to provide fixed-satellite service, it will take all necessary steps to prevent interference to that licensee's FSS operations.

3. Pursuant to Section 1.3, the Commission may waive any provision of its rules if good cause exists and a grant of the waiver would not undermine the policies embodied in the rule. *See Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983) and *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). We find that good cause exists in this case to justify the grant of the three requested waivers. The applicants have shown that their proposed operation will not adversely affect any FSS licensees in the 2655-2690 MHz band in Alaska because there are no current FSS authorizations. Further, with current FSS use of this band non-existent in Alaska, the proposed operations will not affect spectrum availability nor cause any harmful interference. Moreover, the proposed use of the band is consistent with its current use in the contiguous United States.

4. We conclude that, under these circumstances, the proposed relief would serve the public interest. Pursuant to Sections 0.331 and 1.3, 47 C.F.R. §§ 0.331 and 1.3, the applicants' requests for waiver of Section 2.106, Footnote NG47 ARE GRANTED for an indefinite term on a secondary, non-interference basis.[1]

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTE

[1] Although granted for an indefinite term, this waiver is subject to cancellation without a hearing. We would, for example, cancel the waiver if circumstances changed and the licensee were unable to resolve a problem of interference to operations that were consistent with Footnote NG102.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEFONICA LARGA DISTANCIA DE PUERTO RICO — File No. I-T-C-90-171

Application for authority to use facilities in the TCS-1 cable for international services.

ORDER AND AUTHORIZATION

Adopted: December 7, 1990; Released: December 18, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 20, 1990 by Telefonica Larga Distancia de Puerto Rico (TLD), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to use up to 150 of 990 MAUOs previously authorized in Segment F of the Transcaribbean Cable System (TCS-1) between San Juan, Puerto Rico and West Palm Beach, Florida for the provision of its authorized international services.[1] The application was placed on public notice on September 5, 1990. No comments were received. Upon consideration of the application, we find that its grant is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-171 IS GRANTED, and TLD is authorized to use up to 150 of 990 MAUOs previously authorized to be acquired in Segment F of the TCS-1 cable to provide its regularly authorized services between Puerto Rico and overseas points TLD is authorized to serve.[2]

3. IT IS FURTHER ORDERED that the Applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

4. IT IS FURTHER ORDERED that the Applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the Applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

6. IT IS FURTHER ORDERED that the Applicant shall include TCS-1 facility use in the monthly Circuit Status Report filed pursuant to the Commission's Orders. The report shall be filed no later than the 20th day of each month providing the information for the preceding month.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See Puerto Rico Telephone Company et al.*, 5 FCC Rcd 100 (Com. Car. Bur. 1990).

[2] TLD has indicated that initially 24 of the 150 MAOUs will be used for direct service between Puerto Rico and Mexico (12 MAUOs) and Canada (12 MAUOs). TLD has previously been authorized to provide service between the U.S. and Canada and Mexico on a direct basis. *La Telefonica Larga Distancia de Puerto Rico*, 3 FCC Rcd 5937 (Com. Car. Bur. 1988). According to TLD, the remainder of the 150 MAUOs will interconnect with MCI's switch to provide TLD's previously authorized international switched voice services which are currently provided through the resale of MCI's services. *La Telefonica Larga Distancia de Puerto Rico*, 4 FCC Rcd 4496 (Com. Car. Bur. 1989). Should TLD wish to provide direct service to the countries covered by its resale authorization, a new Section 214 authorization will be required.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS COMMUNICATIONS, INC. — File No. I-T-C-90-101

Application for authority to lease and operate terrestrial facilities for the provision of switched services between the United States and Canada

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 7, 1990; Released: December 18, 1990

By Chief, Common Carrier Bureau:

1. The above-captioned application, filed on April 13, 1990, by Cable & Wireless Communications, Inc. (C&W) and supplemented by letters dated April 19, 1990, and July 30, 1990, requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate terrestrial facilities for the provision of switched services, including switched voice, telex, data and facsimile services, between the United States and Canada. The application was placed on public notice on May 16, 1990. No comments were received.

2. C&W is a wholly-owned subsidiary of Cable & Wireless, PLC, a public limited company organized under the laws of the United Kingdom which provides telecommunications services. As a result, C&W is a foreign-owned carrier under the Commission's International Competitive Carrier policies[1] and is dominant in its provision of all international common carrier services between the U.S. and all other countries including Canada. Thus, C&W remains subject to traditional entry and rate regulation. C&W is currently authorized to provide switched voice services by resale between the United States and 161 countries. C&W also is currently authorized to provide switched voice services to Canada through participation in the International Communications Group.[2] C&W is now seeking authority to provide direct switched services, including voice, data, telex and facsimile service, to Canada over its own facilities. [3] The application is a result of successful negotiations with Canadian Pacific Telecommunications, Inc. (CNCP).

3. Our review of the record demonstrates that grant of the application will serve the public interest by increasing competition in the provision of facilities-based services to Canada. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[4] However, we shall limit the grant of authority for use of the facilities authorized herein to the provision of United States-Canada switched services traffic only -- that is traffic that originates in the United States and terminates in Canada or traffic that originates in Canada and terminates in the United States. C&W neither requests authority to use the subject facilities to provide switched services traffic which transits the United States or Canada nor provides any information regarding the accounting rates or settlements for such transit traffic. Should C&W wish to use the facilities authorized herein for the carriage of such transit traffic, it will be necessary for it to seek specific authority to use the subject facilities or other facilities for the provision of such transiting switched services and provide all necessary information pertaining to the accounting and settlement rates and traffic arrangements for third countries, including countries in which C&W has an exclusive franchise and countries in which it has special arrangements.[5]

4. Upon consideration of the subject application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the acquisition of the requested facilities for C&W's provision of switched services, including voice, telex and facsimile service, between the United States and Canada.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-101 IS GRANTED, and C&W is authorized to:

a. lease and operate the following facilities between the United States and Canada:

State/Province	Crossing Point	No. of Circuits
Washington-British Columbia	Blaine	2 T-1 Circuits
Michigan-Ontario	Detroit	3 T-1 Circuits
New York-Ontario	Buffalo-Peace Bridge	2 T-1 Circuits
New York-Quebec	Mooers Forks	2 T-1 Circuits

b. use the facilities in a. above to provide switched services, including voice, telex and facsimile service, between the United States and Canada;

6. IT IS FURTHER ORDERED that the authority to use the facilities authorized herein is limited to the provision of United States-Canada switched services traffic only -- that is traffic which originates in the United States and terminates in Canada or which originates in Canada and terminates in the United States and C&W shall request specific authorization for the use of the subject facilities for the provision of switched services which transit the United States or Canada.

7. IT IS FURTHER ORDERED that grant of application File No.I-T-C-90-101 is subject to the condition that C&W will be classified as dominant in the provision of switched services, including voice, telex and facsimile services, between the United States and Canada absent an express determination by the Commission that C&W is non-dominant.

8. IT IS FURTHER ORDERED that C&W shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services within 90 days from the end of each calendar quarter.

9. IT IS FURTHER ORDERED that C&W shall comply with any current and future Commission policies and requirements concerning international accounting and set-

tlement rates and shall file copies of any operating agreement for Canada entered into by it within 30 days of its execution.

10. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

11. IT IS FURTHER ORDERED that C&W shall file annual traffic and revenue reports as provided for in Section 43.81 of the Commission's Rules, 47 C.F.R. § 43.81, concerning traffic originating or terminating within the United States.

12. IT IS FURTHER ORDERED that C&W shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

13. IT IS FURTHER ORDERED that C&W shall file additional Section 214 applications to supplement existing facilities to Canada or to make additional use of the facilities authorized herein.

14. IT IS FURTHER ORDERED that this authorization is subject to possible revocation or modification as a result of findings, rules, requirements or other actions resulting from the Commission's resolution of *Regulation of International Accounting Rates*, 5 FCC Rcd 4948 (1990), or other proceedings.

15. This order is issued under Section 0.291 of the Commission's Rules and is effective on adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §1.106, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. §1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* International Carrier Policies, 102 FCC 2d 812 (1985) *recon. denied* 60 R.R 2d 1435 (1986).

[2] *See* Southernnet of South Carolina, Inc., 5 FCC Rcd 1024 (Com. Car. Bur. 1990), *amended*, 5 FCC Rcd 2094 (Com. Car. Bur. 1990).

[3] *See* letter dated July 30, 1990 supplementing application File No. I-T-C-90-101.

[4] *See e.g.*, cases cited in Teltec Savings Communications Co., File No. I-T-C-86-062, Mimeo No. 3548 (released April 4, 1986) at n.2.

[5] *See e.g.* International Carrier Policies, *supra* note 1, at 842-3.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 17, 1990

Released: December 18, 1990

Joseph A. Belisle, Esquire 8210-AJZ
Leibowitz & Spencer C10-155
One Southeast Third Avenue
Suite 1450
Miami, Florida 33131-1710

Dear Mr. Belisle:

This is in reference to your request for declaratory ruling permitting KWPM, Inc., licensee of radio stations KWPM(AM) and KPSQ(FM), West Plains, Missouri, and One Hundred and One Communications, Inc., ("One Hundred and One"), licensee of radio stations KUKU-AM and KUKU-FM, Willow Springs, Missouri, to enter into a "network affiliation" agreement whereby KWPM, Inc. will provide KUKU-FM with between 12 and 24 hours of KWPM(AM)'s programming per day. KWPM, Inc. is owned by Robert F. Neathery, and One Hundred and One Communications, Inc. is owned by Bret R. Neathery, his grandson. You state that the city grade signals of KUKU-AM and KUKU-FM overlap with the city grade signal of KPSQ and that there may be some city grade overlap between stations KUKU-FM and KWPM, as well.

Under the terms of the agreement, KUKU-FM must broadcast at least 12 hours per day, and may broadcast up to 24 hours per day, of the programming provided by KWPM, Inc., but may reject programming inconsistent with the public interest, and may preempt KWPM's programming to broadcast locally-oriented programming. KWPM, Inc. will pay One Hundred and One up to $1500/month to cover the power costs of operating KUKU-FM's transmitter and facilities. KWPM, Inc. will pay for all interconnection costs to enable KUKU- FM to broadcast One Hundred and One's programming, and agrees to provide KUKU-AM and KUKU-FM the services of a transmitter operator to enable the stations to expand their programming on weekends and after normal business hours on weekdays. One Hundred and One agrees to establish a remote control point for KUKU-AM and KUKU-FM within the city of West Plains, Missouri. The agreement's term is for one year, with automatic six-month extensions thereafter.

We find no Commission policy that would prohibit one radio station from providing programming to another radio station with overlapping contours, whether the agreement is termed a "network affiliation" agreement or a "time brokerage" agreement. We have recently denied a complaint against a radio station that had entered into a reciprocal time brokerage agreement with another radio station in the same market, as well as an option to purchase the station, because there was no evidence that the station had not retained ultimate control over its finances, personnel matters and programming. *Letter to Roy R. Russo from Roy J. Stewart*, released August 1, 1990. In that letter, we referred to the Commission's statement in *Part-Time Programming*, 82 FCC 2d 107, 108, 114 (1980) which encouraged time brokerage agreements, but warned licensees against abdicating control over station operations. *Letter to Roy R. Russo* at 2-3. We also referred to the Commission's most recent statement on time brokerage agreements that "a licensee must continue to maintain control over its programming." *Id; Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208, 2214 (1989).

The issue of control is particularly salient here, where there is a familial relationship between the two stations. Although we will not presume common control between the stations by virtue of that relationship alone, *see KTRB Broadcasting Co., Inc.*, 46 FCC 2d 605 (1974), facts could arise which would lead us to conclude that one entity is exercising actual control over both stations.

We conclude, however, that regardless of the number of hours of programming KUKU-FM chooses to accept from KWPM, Inc., the Commission approves the implementation of the affiliation agreement, as long the KUKU-FM continues to meet all of the Commission's requirements in meeting its local service obligations, including but not limited to, retaining the right to reject programs not in the public interest, retaining the right to cut into KWPM, Inc.'s programming in case of an emergency; broadcasting station identifications, maintaining a main studio within the station's principal community contour, covering local community issues for its issues/programs list, as well as maintaining the public inspection file.

I trust the foregoing is responsive to your inquiry.

FEDERAL COMMUNICATIONS COMMISSION

Edythe Wise, Chief
Complaints & Investigations Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 1, 1990

Released: December 18, 1990

Roy R. Russo, Esquire 8210-AJZ
Lawrence N. Cohn, Esquire C4-383
Counsel, Spanish Radio Network C4-362
Cohn & Marks
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, D.C. 20036

Dear Messrs. Russo and Cohn:

This is in reference to the "Petition for Emergency Relief" filed on March 28, 1990, on behalf of Spanish Radio Network ("SRN"), licensee of radio stations WQBA and WQBA-FM, Miami, Florida (formerly Susquehanna Radio Corporation and Radio de Miami, Inc., respectively). New Age Broadcasting, Inc. ("New Age"), licensee of radio station WXDJ, Homestead, Florida, and Licensee Corporation #2, licensee of radio station WRTO(FM), Goulds, Florida, (formerly WAQI-FM) filed a "Joint Opposition," which was followed by a reply by SRN.

By way of background, New Age and Viva American Media Group ("Viva"), the parent corporation of Licensee Corporation #2, entered into reciprocal time brokerage agreements on February 10, 1990.[1] The agreements provide for the provision of programming via telephone facilities by the time broker from 4 a.m. to midnight seven days a week for 24 months. The hours of midnight to 4 a.m. are reserved for the use of the licensee. Pursuant to the agreements, on February 20, 1990, WXDJ changed from a soft rock/jazz format to a Spanish language format and WRTO changed from a Spanish language format to a soft rock/jazz format for 20 hours each day.[2] On February 10, 1990, Viva also acquired an option to purchase WXDJ for $14.5 million, which it must exercise within seven months or pay an "option fee" of $2 million to New Age.

SRN requests that the Commission order New Age and Viva to terminate their reciprocal time brokerage agreements. SRN contends that the time brokerage agreements, combined with the option agreement, give Viva *de facto* control over WXDJ, resulting in an unauthorized transfer of control, in violation of Section 310(d) of the Communications Act, as amended. [3] Petitioner also contends that the control afforded to New Age and Viva over each others' stations (whose contours overlap) by the time brokerage agreements violates the duopoly rule in Section 73.3555(a)(2) of the Commission's Rules.[4] WRTO and WXDJ retort that the time brokerage agreements not only comply with Commission requirements for the retention of ultimate authority in the licensee, but are also in accord with Commission policy encouraging such agreements. They also liken the agreements to network affiliation contracts in which stations retain authority over brokered network programming. Finally, they dispute that the duopoly rule is implicated by these agreements, since no "control" reposes in either broker. Petitioners reply that it is the combination of the extensive time brokerage agreements, the degree of control actually exercised by Viva, and the substantial investment of $2 million in WXDJ that raises questions as to whether a premature transfer of control of WXDJ to Viva has occurred.

In 1980, the Commission encouraged time brokerage agreements as increasing available program alternatives, but also expressed its concern with licensees that abdicate control over station operations to time brokers. *Part - Time Programming*, 82 FCC 2d 107, 108, 114 (1980). Last year, the Commission decided to let antitrust laws remedy any anticompetitive concerns raised by time brokerage arrangements, rather than prohibit the arrangements altogether. *Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208, 2214 (1989). The Commission warned, however, that "a licensee entering a time brokerage arrangement must continue to maintain control over its programming." *Id.*

SRN attempts to show that fundamental changes have taken place at WXDJ in the areas of programming, sales, personnel and finances. Specifically, Petitioner states that aside from the almost complete format change, overall programming at WXDJ is now under Viva's control as to selection of music and artists, the amount, type and timing of news coverage, issue-oriented programming and guests to appear on such programming. In the area of sales, Petitioner states that Viva determines advertising rates and scheduling, as well as solicitation of advertising accounts. As to personnel, Petitioner charges Viva with hiring and firing all station personnel, except for WXDJ's General Manager, whom SRN characterizes as a figurehead with no real control over station operations. Petitioner alleges, for example, that according to local news reports, shortly after February 10, 1990, virtually all of WXDJ's staff was terminated.[5] In the area of finances, SRN points out that Viva pays New Age a pre-established monthly brokerage fee, keeps all revenues for the advertising time it sells, and profits to the extent that advertising revenues exceed the brokerage fee plus expenses.

Generally, the principal indicia of control the Commission considers in determining whether an unauthorized transfer of control has taken place are station finances, personnel matters and programming. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981). The Commission will also look behind the terminology of a station's agreements with prospective purchasers to determine whether the prospective purchaser has assumed early control of these aspects of the station's operation. *Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981). SRN relies on *Phoenix Broadcasting Co.*, 44 FCC 2d 838 (1973), in which the Commission warned prospective purchasers to refrain from taking any actions, such as assuming general managerial functions, that could result in the premature exercise or assumption of control of the station involved. In a similar situation in *Fine Arts Broadcasting, Inc.*, 57 FCC 2d 108, 111 (1975), the Commission did not find an unauthorized transfer of control, but warned prospective purchasers not to assume managerial positions at the stations they seek to buy except under the most compelling circumstances.

SRN has not documented its allegations that Viva has taken over station operations in a manner outside the ordinary course of time brokerage agreements or has not abided by the terms of its contract with New Age. The

reciprocal agreements between Viva and New Age reflect that the licensee "shall have full authority and power over the operation of the station during the period of this agreement," including the right to accept or reject programming or advertisements or to preempt programming for programming of greater importance,[6] and that "whenever on the Station's premises, all personnel shall be subject to the supervision and the direction of [the licensee's] General Manager and/or Chief Engineer."[7] They also provide that the licensee may suspend or cancel any programs that the licensee or its general manager determine are not in compliance with the standards set forth by the respective stations.[8] The functions described by SRN -- decisions over programming, advertising, and sales -- are characteristic of all time brokerage agreements, and are permissible as long as they do not represent the ultimate decisions in those areas. *See United Broadcasting of New York, Inc.*, 4 RR 2d 167, 173 (1965). What SRN characterizes as Viva's "control of, and responsibility for finances and profits/losses" merely describes the financial arrangement characteristic of time brokerage arrangements -- a profit of advertising revenues over brokerage fee. *Id.* SRN's allegations, without more specific documentation, do not raise questions as to whether Viva has assumed an undue amount of control over WXDJ.

We also find the *Phoenix* case distinguishable, as the prospective purchaser, in addition to his daily involvement in the station's operations, had infused the station with cash for working capital. *Phoenix*, 44 FCC 2d at 838. In this case, WRTO's potential $2 million option fee does not represent a present investment of working capital in the station. Further, unlike the *Phoenix* and *Fine Arts* cases, SRN has not shown that any Viva principals have assumed managerial positions at WXDJ.[9] SRN's assertion that WXDJ's General Manager is a figurehead with no actual management authority is mere speculation, unsupported by any documentation that the time broker's decisions take precedence over, or are on par with, that of the General Manager.

Even in a management context, the mere existence of a management contract will not constitute an unauthorized transfer of control under Section 310(d) of the Act unless the contract vests a disproportionate degree of control in the manager. *See, e.g., Stereo Broadcasters, Inc.*, 87 FCC 2d 87, 94 (1981)(ten-year irrevocable management contract with station investor exercising ultimate control over finances, staff, and format violates Section 310(d)). By contrast, these time brokerage agreements, though extensive, do not even contemplate a change in management at either station. Therefore, their existence does not raise the specter of a Section 310(d) violation without evidence that the parties have not abided by the terms of their contracts. *Compare Cosmopolitan Broadcasting Corporation*, 59 FCC 2d 558, 561 (1976), *recon. denied*, 61 FCC 2d 257 (1976), *remanded on other grounds*, 581 F.2d 917 (D.C. Cir. 1978)(non-renewal of license for abdicating complete control over programming to time brokers).

Because SRN has not provided any documentation indicating that Viva is in control of WXDJ, we also reject SRN's allegation that the parties have violated the duopoly rule. There is no showing that Viva "owns, operates, or controls" WXDJ, or conversely, that New Age owns, operates or controls WRTO in violation of Section 73.3555(a)(2) of the Commission's Rules. *See, e.g., Station WWSM*, 31 FCC 2d 584, 585 (1971)(time brokerage agreement does not violate duopoly rule in absence of licensee abdication of control). We similarly reject SRN's argument that the Commission's cross-interest policy is implicated here, as the Commission specifically exempted time brokerage agreements from the purview of the cross-interest policy. *See Reexamination of the Commission's Cross - Interest Policy*, 4 FCC Rcd 2208, 2214 (1989). Therefore, the Commission's pending Rule Making on "key employees,"[10] as cited by SRN, will have no bearing on whether time brokerage agreements will pass muster under the Commission's Rules.

In view of the foregoing discussion, we do not believe an inquiry into this matter is warranted. Accordingly, your "Petition for Emergency Relief" IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

FOOTNOTES

[1] We note that, although the Commission no longer requires the filing of time brokerage agreements under § 73.3613 of the Commission's Rules, the licensees voluntarily filed copies of their agreements with the Commission.

[2] WXDJ's counsel has since informed the Commission that on May 12, 1990, WXDJ changed its midnight to 4 a.m. format to "Radio El Sol," a Spanish language format (that is slightly different from the other Spanish language format) and, in turn, WRTO has switched its 4 a.m. to midnight format to Radio El Sol. Neither station is programming in English at this time. Counsel assures us, however, that WXDJ's Spanish-speaking Executive Secretary and other WXDJ personnel monitor the foreign language programming.

[3] Section 310(d) of the Communications Act of 1934, as amended, provides, in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

[4] Section 73.3555(a)(2) of the Commission's Rules states:

> No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls one or more broadcast stations in the same service and the grant of such license will result in any overlap of the predicted 3.16 mV/m contours of the existing and proposed FM stations, computed in accordance with § 73.313.

[5] Petitioner provided articles from the February 12 and February 14, 1990, issues of *Inside Radio* and *The Miami Herald*, respectively, which reported that "32 of 35 [WXDJ] employees got their walking papers" shortly after the stations entered into the time brokerage agreements. The April 11, 1990, issue of *Radio World* reported that WXDJ's sales force was reduced from nine to four and the promotion department eliminated.

[6] Time Brokerage Agreement for Radio Station WXDJ-FM, § 11; Time Brokerage Agreement for Radio Station WAQI-FM (now WRTO), § 11.

[7] *Id.* at § 11.

[8] *Id.* at § 9.

[9] In fact, upon questioning from Commission staff about its staff and managerial situation, counsel for WXDJ responded that only its sales and promotions staff had been terminated, with new sales hires and rehires, as well as some attrition from the programming staff as a result of the changed language format. According to WXDJ, it retained its management personnel, including its General Manager, Business Manager, Traffic Director, Executive Secretary, and Chief Engineer.

[10] *Further Notice of Inquiry/Notice of Proposed Rulemaking*, MM Docket No. 87-154 (released February 28, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone &
Telegraph

Comparably Efficient Interconnection
Plan for Transaction Services

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1990; Released: December 18, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 7, 1990, pursuant to the requirements of the *Computer III* proceeding,[1] the American Telephone and Telegraph Company (AT&T) filed an Amendment[2] to its approved Comparably Efficient Interconnection (CEI) Plan for Transaction Services. [3] In the Amendment, AT&T proposes to offer a point-of-sale capability that would enable a customer to provide products and services to consumers using a single nationwide telephone number to reach multiple sites, as determined by the customer's calling area database.[4] Two parties filed comments, and AT&T filed reply comments. In this order, pursuant to the authority delegated to us by the Commission, we approve AT&T's Amendment to its Transaction Services Plan.

II. BACKGROUND

2. The Court of Appeals for the Ninth Circuit recently vacated the *Computer III* decisions and remanded to the Commission for further proceedings consistent with its opinion.[5] The vacation of the *Computer III* orders generally returns carriers to the *Computer II* regime. In order to preserve the status quo during remand proceedings, however, the Commission granted AT&T an interim waiver of the *Computer II* requirements. Consistent with that waiver, the Bureau is processing pending AT&T CEI plans.[6]

3. The *Phase I Order* requires that AT&T obtain approval of a CEI plan before it may offer a specific enhanced service, or a class of services, on an unseparated basis. AT&T's CEI plan must make basic facilities and services used by AT&T in providing that enhanced service available to other enhanced service providers (ESPs) and users on an unbundled and functionally equal basis.[7] AT&T's CEI Plan must satisfy the CEI parameters as well as the nonstructural safeguards governing cost allocations, the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting.[8]

III. SERVICE DESCRIPTION

4. The *Transaction Services Order* approved AT&T's plan for the collocated provision of its Transaction Services offering, an enhanced service that allows merchants at points of sale to interact with computers used by merchant credit processors to process sales, credit, debit, or check transactions, or other transactions requiring authorization.

5. AT&T now proposes to provide a point-of-sale capability that will allow AT&T Transaction Services customers to offer products and services to consumers "using a single nationwide telephone number to reach multiple sites as determined by the customer's calling area database."[9] Using the caller's ANI, and the customer's database, calls to the nationwide number will be routed to the appropriate customer location.[10] AT&T states that AT&T Transaction Services will create and store call detail information for the customer, and will permit callers to hear prerecorded information prepared at the direction of the customer.

IV. CEI REQUIREMENTS

6. AT&T states that it will continue to satisfy the *Computer III* CEI requirements and the Commission's other nonstructural safeguards in the manner described in its approved CEI plan for Transaction Services.[11] AT&T states that it will comply with the requirements regarding the unbundling of basic services, resale, technical characteristics, CEI availability, and recipients of CEI by continuing to use basic tariffed services, available to other enhanced service providers on the same terms and conditions.[12] AT&T states that it will comply with the interface functionality requirements by continuing to use interfaces described in technical publications. AT&T says that it will use the same approved standards and procedures for provisioning, maintenance, or repair of facilities and circuits for AT&T Transaction Services and other ESPs, and therefore will comply with the installation, maintenance and repair requirements. AT&T states its intention to meet the end-user access requirements by continuing to use standard switched access or special access available from the LECs under tariff. With regard to the minimization of transport costs, AT&T notes that local loops between an ESP's premises and a LEC serving wire center and through the LEC wire center to AT&T central offices are obtained through the LEC, which controls transport costs. However, AT&T states that it will continue to offer tariffed multiplexing functions to help minimize transport costs, and permit ESPs to reduce LEC access costs by provisioning their own access or by concentrating their traffic.

V. POSITIONS OF THE PARTIES

7. Applied Telematics, Inc. (Telematics) alleges that AT&T's Transaction Services Amendment may be in violation of U.S. Patent #4,757,267 granted July 12, 1988 to Telematics, since no license has been granted to AT&T for use of the process.[13] In response, AT&T states that the allegation that AT&T's proposed service may violate a patent held by Telematics is irrelevant to this proceeding because the Commission has held that CEI plans and amendments are evaluated solely on the basis of their compliance with the Commission's CEI parameters and other nonstructural safeguards.[14]

8. The California Bankers Clearing House Association and The New York Clearing House Association (Transaction Service Providers) assert that the Commission should not approve the Amendment or permit it to take effect without clarifying several issues.[15] Transaction Service Providers argue that when AT&T is using network equipment and services to provide transaction services to customers, the same network equipment should be available to other providers at the same price, and under the same conditions. Specifically, Transaction Service Providers seek confirmation that any network services or equipment used in providing the following services will be available to users under the same terms and conditions as they are available to AT&T: (1) the single nationwide number (2) automatic number identification (ANI); (3) customer call forwarding databases; (4) call detail processing, aggregation, and storage; and (5) provision or storage of prerecorded announcements.[16]

9. In addition, Transaction Service Providers argue that if any of the services AT&T proposes are to be performed by AT&T Transaction Services equipment located in AT&T central offices, links or short wire connections must be established between network and AT&T Transaction Services equipment. Transaction Service Providers argues that AT&T should state whether these connections are tariffed, whether AT&T Transaction Services must pay charges that would normally apply to lines terminating outside the central office, and whether AT&T attributes any such charges to itself on a parity pricing basis.

10. AT&T responds that its Amendment complies fully with the Commission's CEI requirements. First, AT&T states that the single nationwide number may be obtained through AT&T in conjunction with AT&T's tariffed basic network services, under the same terms and conditions that are applicable to all other customers, and through local exchange carriers (LECs), subject to the same LEC tariff terms applicable to all other LEC customers. Second, AT&T states that when AT&T's Transaction Services uses AT&T services that provide ANI, it is subject to the same tariff terms and conditions applied to all other customers. Third, AT&T states that the customers' call forwarding information data base will be maintained in non-network AT&T Transaction Services equipment collocated in AT&T central offices. AT&T states that the cost for the building space will be allocated pursuant to the Commission's accounting rules. Fourth, AT&T states that it will use tariffed AT&T services, available to all customers on the same basis, to transport customer call detail. AT&T states that non-network equipment will be used for the processing and aggregation of call detail information. Fifth, AT&T states that non-network equipment will be used to provide and store customers' prerecorded announcements.

11. Finally, AT&T states that AT&T Transaction Services will use an office connection, available to all customers under an AT&T tariff, to provide the "short wire" link between AT&T Transactions Services equipment and the basic tariffed network transport services. AT&T asserts that the Commission has previously held that it is not required to pay any additional charges for the "short wire" links.[17]

VI. DISCUSSION

12. We find that AT&T's Amendment is consistent with the class of services that we approved in the *Transaction Services Order*, and complies with the CEI requirements. Telematic's allegation that AT&T may violate a patent is not relevant to our determination of whether AT&T's Amendment complies with our CEI requirements.

13. In addition, we conclude that AT&T has adequately responded to Transaction Service Providers' request for clarification. AT&T has stated that all network services used in the provision of call routing, ANI, and the transport of customer call detail are generally available on a tariffed basis to all users, on the same terms and conditions as used by AT&T Transaction Services. AT&T has also stated that non-network equipment will be used in the provision of the customer call forwarding database, the processing and aggregation of call detail information, and the provision and storage of customer's prerecorded announcements. Based on this information, we conclude that AT&T has confirmed that all network services and equipment used to provide the services described in the Amendment will be available to all users under the same terms and conditions they are used by AT&T Transaction Services. In addition, we conclude that the use of a tariffed office connection for the "short wire" link is consistent with our previous decisions.[18] Accordingly, we approve this Amendment to AT&T's Transaction Services Plan.[19]

VII. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED, that pursuant to Sections §.91 and §.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, the Amendment described herein to AT&T's Transaction Services CEI Plan IS APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *Phase I Order* and *Phase I Reconsideration vacated sub. nom.* California v. FCC, No. 87-7230 (9th Cir. filed June 6, 1990), *appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir. pet. for rev. filed May 16, 1988); *Phase II Order*, CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *Phase II Order vacated sub nom. California v. FCC*, No. 87-7230 (9th Cir. filed June 6, 1990), *appeal pending sub nom. California v. FCC*, No. 88-7183 (9th Cir. filed May 13, 1988).

[2] Amendment to AT&T CEI Plan for Transactions Services, June 7, 1990 (Amendment).

[3] AT&T Plan for Provision of Transaction Services, 3 FCC Rcd 2702 (1988), *applications for review denied*, 4 FCC Rcd 4544 (1989) *(Transaction Services Order)*.

[4] AT&T also proposes to expand its offering of the type of point-of-sale service described in the original approved CEI plan to include commercial establishments and customers. Amendment at 3 note *.

[5] *California v. FCC*, No. 87-7230, slip. op. (9th Cir. June 6, 1990). The Commission decisions under review were the *Phase I Order, Phase I Reconsideration, and Phase II Order*.

[6] *See Computer III* Remand Proceedings, 5 FCC Rcd 4708 (Com. Car. Bur. 1990) at para. 2; Notice of Proposed Rule Making, CC Docket No. 90-368, 5 FCC Rcd 5242 (Com. Car. Bur. 1990). Pursuant to the Commission's decision, the Bureau will examine AT&T's plans to determine whether they comply with the *Computer III* CEI requirements, which define the scope of the interim waiver.

[7] *Phase I Order*, 104 FCC Rcd at 1036.

[8] *Id* . at 1020.

[9] Amendment at 2.

[10] Amendment at 3. AT&T Transaction Services customers will create, validate, and update their databases, while AT&T will maintain the equipment that supports the databases.

[11] The *Phase I Order* established nine CEI parameters that all plans must satisfy: interface functionality; unbundling of basic services; resale; technical characteristics; minimization of transmission costs; installation, maintenance and repair; end user access; CEI availability; and recipients of CEI. 104 FCC 2d at 1038-1043.

[12] These tariffed services include ACCUNET Packet Service, the ACCUNET Spectrum of Digital Services, Private Packet Network Service, AT&T Nodal Validator, AT&T 800 Service, AT&T MEGACOM 800 Service and AT&T MEGACOM Service.

[13] Letter from Ian J. Michel, Applied Telematics, Inc. to Secretary, FCC, August 9, 1990.

[14] AT&T Reply Comments at 2-3.

[15] Transaction Service Providers Comments at 3.

[16] *Id* . at 3-5.

[17] AT&T Reply Comments at 7 *citing Transaction Services Order*, 3 FCC Rcd 2708-9, at para. 57.

[18] *See Transaction Services Order*, 3 FCC Rcd 2708-9, para. 57.

[19] Approval of this Amendment is, of course, subject to AT&T's continued compliance under the Amended CEI Plan with the Commission's other CEI Plan requirements, including the separation of regulated from nonregulated costs, the treatment of CPNI, and the preparation and filing of nondiscrimination reports. *See Transaction Services Order*, 3 FCC Rcd at 2710-2712.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PHONE AMERICA OF CAROLINA, INC.,
Complainant,

v. File No. E-89-365
File No. E-89-367

SOUTH CENTRAL BELL TELEPHONE COMPANY and
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: December 7, 1990; Released: December 18, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 20, 1989, Phone America of Carolina, Inc. (hereinafter "Phone America") filed with the Commission the above-captioned formal complaints against South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (hereinafter the "Defendants") seeking recovery of damages for Defendants' alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1987. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling the complaints. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On September 13, 1990, the parties filed a joint motion seeking dismissal of the complaints with prejudice. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-357

In the Matter of

Amendment of the Commission's Rules
with regard to Establishment
and Regulation of New Digital Audio
Radio Services

FEDERAL COMMUNICATIONS COMMISSION

Bruce Franca
Acting Chief Engineer

ORDER GRANTING EXTENSION OF TIME

Adopted: December 11, 1990; Released: December 12, 1990

By the Office of Engineering and Technology:

1. The National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Hispanic Media Coalition, and the National Black Media Coalition (Civil Rights Organizations), have jointly requested an extension of the reply comment period in the above proceeding to December 28, 1990. Reply comments are currently due December 14, 1990. *See Order Granting Extension of Time*, GEN Docket No. 90-357, 5 FCC Rcd 5951 (1990).

2. The Civil Rights Organizations state that they have developed a mathematical model to identify minority needs for new radio service over the next 20 years, and that they are currently developing estimates of need for each of the 260 rated radio markets. However, the Civil Rights Organizations claim that as their resources are limited, calculations of the estimates must be performed by hand and cannot be completed by the current December 14, 1990, reply comment deadline. They also state that this brief extension of time will allow them to provide material that will assist the Commission in determining how much spectrum should be set aside for growth.

3. We believe that additional time for filing reply comments is warranted. The Commission desires as complete a record as possible to assist in formulating its digital audio radio service proposals. The material to be provided by the Civil Rights Organizations may assist us in that regard. Further, due to the large number of comments filed in this proceeding, we believe that an extension of time will allow other parties to formulate more meaningful replies as well. However, as the requested extension falls in the middle of the holiday season, we will extend the reply comment period by 24 days to January 7, 1991. Accordingly, pursuant to authority found in Section 4(i), 302, and 303 of the Communications Act of 1934, as amended, IT IS ORDERED that the reply comment period IS EXTENDED to January 7, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-409

In the Matter of

Amendment of Section 73.202(b), RM-7344
Table of Allotments,
FM Broadcast Stations.
(Otterville, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 29, 1990; Released: December 18, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5511 (1990), issued in response to a petition filed by Otterville Broadcasting Company (petitioner). The *Notice* proposed the allotment of FM Channel 299A to Otterville, Missouri, as that community's first local broadcast service. Petitioner filed comments in support of the *Notice* and stated its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 299A to Otterville, Missouri, since it could provide the community with its first FM broadcast service. Channel 299A can be allotted to Otterville in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction of 8.2 kilometers (5.1 miles) east of the community.[1] The site restriction will prevent a short spacing to the construction permit for Station KCFM, Channel 297C, Lexington, Missouri.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 1, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Otterville, Kansas	299A

4. The window period for filing applications for Channel 299A at Otterville will open on **February 4, 1991,** and close on **March 6, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 299A are 38-43-29 and 92-54-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-615

In the Matter of

Amendment of Section 73.202(b), RM-7552
Table of Allotments,
FM Broadcast Stations.
(Adams, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 29, 1990; Released: December 18, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Karle Roekle (petitioner) seeking the allotment of FM Channel 291A to Adams, Wisconsin, as that community's first local broadcast service. Petitioner provided an engineering study in support of the petition and indicated that he would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment could provide a first local broadcast service to Adams. Channel 291A can be allotted to Adams, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules at the city reference coordinates.[1]

3. In view of the above, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Adams, Wisconsin	---	291A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 8, 1991,** and reply comments on or before **February 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Karle Roekle, President
Jefcom Mobile Radio
408 Friendship,
Wisconsin 53934

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 291A are 43-57-06 and 89-49-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-366

In the Matter of

Amendment of Section 73.202(b), RM-7221
Table of Allotments,
FM Broadcast Stations.
(Lynchburg, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 19, 1990; Released: December 18, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Lynchburg Independent Broadcasters, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making* proposing the substitution of Channel 261C3 for Channel 261A at Lynchburg, Virginia, and the modification of its license for Station WKZZ(FM) at Lynchburg to specify operation on the higher powered channel. No other comments were received.[1]

2. We believe the public interest would be served by substituting Channel 261C3 for Channel 261A at Lynchburg, Virginia, since it would provide the community with an expanded coverage area FM service. Channel 261C3 can be allotted to Lynchburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.9 kilometers (4.3 miles) northeast of the city,[2] in order to avoid short-spacings to Station WANV-FM, Channel 259B, Staunton, Virginia, Station WZBB(FM), Channel 260A, Rocky Mountain, Virginia, and Station WWWB(FM), Channel 262C, High Point, North Carolina. As proposed, we will also modify petitioner's license for Station WKZZ(FM) to specify operation on Channel 261C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 1, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lynchburg, Virginia	252A, 261C3, 269C3, 290A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Lynchburg Independent Broadcasters, Inc. for Station WKZZ(FM), Lynchburg, Virginia, IS MODIFIED to specify operation on Channel 261C3, in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Douglas Broadcasting, Inc., filed informal comments requesting consideration in this proceeding of its proposal to substitute Channel 250C3 for Channel 252A at Lynchburg, Virginia, and to modify the license of Station WGOL(FM) accordingly (RM-7431). There is no conflict between Douglas's and petitioner's proposals. Douglas's proposal is the subject of a separate *Notice of Proposed Rule Making* adopted October 31, 1990.

[2] The coordinates for Channel 261C3 at Lynchburg are North Latitude 37-28-00 and West Longitude 79-06-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-616

In the Matter of

Amendment of Section 73.202(b), RM-7554
Table of Allotments,
FM Broadcast Stations.
(Cold Spring and Litchfield,
Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1990; Released: December 18, 1990

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Litchfield Broadcasting Corp. (petitioner), licensee of Station KMXK-FM, Channel 235C2, Litchfield, Minnesota, requesting the reallotment of its channel to Cold Spring, Minnesota, and the modification of its license accordingly.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[1] In this regard, petitioner advises that the requested change to Cold Spring is mutually exclusive with the allotment of Channel 235C2 at Litchfield. Petitioner states that, operating from the site specified in its construction permit (BMPH-881205IB) with existing facilities, Station KMXK-FM places a 70 dBu signal over the entire community of Cold Spring. Petitioner adds that Stations KMXK-FM and KQIV(AM) are licensed to Litchfield (population 5,904),[2] whereas Cold Spring (population 2,294) has no local transmission service. Thus, petitioner's proposal would provide a first local broadcast transmission service to Cold Spring and would not deprive Litchfield of local service.

3. A staff engineering analysis indicates that Channel 235C2 can be allotted to Cold Spring in compliance with the Commission's rules and regulations.[3]

4. We believe the public interest would be served by proposing to reallot Channel 235C2 from Litchfield to Cold Spring, Minnesota, as requested, in order to provide Cold Spring with its first local aural transmission service. In addition, we shall propose to modify the authorization for Station KMXK-FM, as requested, to specify Cold Spring as its community of license. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional equivalent channel at Cold Spring.

5. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Cold Spring, Minnesota	---	235C2
Litchfield, Minnesota	235C2	---

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **February 8, 1991,** and reply comments on or before **February 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia
Howard J. Barr
Pepper and Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel to the petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License,* 4 FCC Rcd 4870 (1989), *recon. granted in part,* FCC 90-374, released November 30, 1990.

[2] Population figures are taken from the 1980 U.S. Census.

[3] The coordinates for Channel 235C2 are 45-23-53 and 94-25-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-617

In the Matter of

Amendment of Section 73.202(b), RM-7564
Table of Allotments,
FM Broadcast Stations.
(Tahlequah, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 7, 1990; Released: December 18, 1990

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Demaree Communications, Inc. (petitioner), requesting the substitution of Channel 269C3 for Channel 269A at Tahlequah, Oklahoma, and the modification of the license of Station KEOK(FM) to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 269C3 for Channel 269A at Tahlequah, Oklahoma, since it could provide the community with a wide coverage area FM service. Channel 269C3 can be allotted to Tahlequah in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.4 kilometers (9.6 miles) south to avoid short-spacings to the outstanding construction permits for Stations KISK, Channel 270C2, Lowell, Arkansas, and KBIX-FM, Channel 271A, Wagoner, Oklahoma.[1] Use of this site restriction does not negate short-spacings to the allotment coordinates for Channel 270C2 at Lowell or Channel 271A at Wagoner. Therefore, final action in this proceeding may be contingent upon the licensing of both Station KISK and Station KBIX-FM at the transmitter sites specified in their outstanding construction permits. As requested, we also propose to modify petitioner's license for Station KEOK(FM) to specify operation on Channel 269C3. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 269C3 at Tahlequah or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Tahlequah, Oklahoma	269A	269C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 8, 1991,** and reply comments on or before **February 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Paul S. Demaree
Demaree Communications, Inc.
517 South Muskogee Avenue
P.O. Box 719
Tahlequah, Oklahoma 74465
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 269C3 at Tahlequah are North Latitude 35-46-56 and West Longitude 94-59-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),	**MM Docket No. 87- 455**
Table of Allotments,	RM-5899
FM Broadcast Stations.	RM-6223
(Perry, Cross City, Holiday,	RM-6224
Avon Park, Sarasota, and	*RM-6225*
Live Oak, Florida; *Thomasville,*	RM-6226
Georgia)	

In the Matter of

Amendment of Section 73.202(b),	**MM Docket No. 87-486**
Table of Allotments,	RM-5938
FM Broadcast Stations.	RM-6242
(*Tallahassee,* Quincy, and	RM-6278
Crawfordsville, Florida, and	*RM-7178*
Bainbridge, Georgia)	

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1990; Released: December 19, 1990

By the Chief, Policy and Rules Division:

1. The Commission has before it a "Notice of Voluntary Dismissal with Prejudice and Withdrawal of Petition for Reconsideration" filed September 25, 1990, by Dolcom Broadcasting, Inc. ("Dolcom"), licensee of Station WTHZ, Channel 276A, Tallahassee, Florida. This pleading requests dismissal of Dolcom's Petition for Reconsideration directed to the *Report and Order* in this proceeding, 4 FCC Rcd 5599 (1989), which, *inter alia*, denied its proposal to substitute Channel 276C2 for Channel 276A at Tallahassee, and modify the Station WTHZ license to specify operation on Channel 276C2. The Commission also has before it a "Motion for Severance and Suggestion of Grant" filed October 16, 1990, by Thomasville Radio, Inc., licensee of Station WSTT-FM (formerly WLOR), Thomasville, Georgia.

2. The proposed Station WTHZ upgrade was denied in order to grant a conflicting upgrade proposal by Station WSTT-FM, Channel 296A, Thomasville, Georgia, proposing operation on Channel 296C1. Under Section 1.420(f) of the Commission's Rules, the upgrade at Thomasville was stayed by the filing of the Petition for Reconsideration by Dolcom. In view of the dismissal request by Dolcom, we will grant the Motion for Severance filed by Thomasville Radio, Inc. Three other petitions for reconsideration in this proceeding remain pending. Sarasota FM, Inc., licensee of Station WSRZ, Channel 292A, Sarasota, Florida, seeks reconsideration of the failure to consider its untimely proposed upgrade to Channel 293C2. Gator Broadcasting Corporation, licensee of Station WGGG, Channel 249A, Micanopy, Florida, seeks reconsideration of the denial of its proposed upgrade to Channel 247C2. Pasco Pinellas Broadcasting Company, licensee of Station WLVU, Channel 292A, Holiday, Florida, seeks reconsideration of the denial of its proposed upgrade to Channel 292C2. None of these remaining petitions for reconsideration are directed to the Channel 296C1 upgrade at Thomasville, Georgia, or any allotment which could impact or affect our decision on this upgrade. As a result, we believe that there is no longer any need to stay the effectiveness of the Channel 296C1 upgrade at Thomasville, Georgia. *See Clemson, South Carolina,* 2 FCC Rcd 5970 (1987).

3. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Dolcom Broadcasting, Inc. IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That the aforementioned "Motion for Severance and Suggestion of Grant" IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-518

In re Applications of

James Wilson III (hereafter "Wilson")	File No. BPH-891005MF
Circle City Broadcasters, Ltd. (hereafter "Circle")	File No. BPH-891006MQ
G. Dean Pearce (hereafter "Pearce")	File No. BPH-891006NB
Landmark of Alabama, Inc. (hereafter "Landmark")	File No. BPH-891006NC
Wiregrass Broadcast Associates, LTD. (hereafter "Wiregrass")	File No. BPH-891006NL
Hubcap Classics Radio Network, Ltd. (hereafter "Hubcap")	File No. BPH-891006MR (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 267A (101.3 MHz)
in Dothan, Alabama

HEARING DESIGNATION ORDER

Adopted: October 16, 1990; Released: December 19, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Hubcap*. An engineering review discloses that, on the original U.S.G.S. topographic map submitted with Hubcap's application, the location of the proposed antenna site was plotted at 31 degrees, 14 minutes, *26* seconds North Latitude. The geographic coordinates specified in Section V-B, Item 2(b) of the application (31 degrees, 14 minutes, *30* seconds) do not match the coordinates for the site plotted on the cited map. Consequently, a four-second discrepancy exists between the two sets of coordinates which the staff was unable to resolve confidently and reliably by drawing on the application as a whole.

3. In the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission adopted a "hard look" approach as to certain critical elements that are essential to a determination that an application is "substantially" complete. This approach benefits the public interest by reducing frivolous and speculative applications and streamlines our processing procedures to make more efficient use of our staff and other resources. *See, e.g., Star Signal Corporation*, 1 FCC Rcd 450 (1986); *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). Further, in Appendix D to the *Report and Order, supra*, we stated that the absence of the geographic coordinates *to the nearest second* would prevent a determination of acceptability and thereby renders the application not substantially complete. Thus, in the present case, the inconsistency in the North Latitude coordinates makes it impossible to determine either the veracity of the site availability certification, our environmental impact statement, or the information supplied for FAA approval. *See, e.g., Steven B. Courts*, 4 FCC Rcd 4764 (1989). Accordingly, we conclude that Hubcap's application was inadvertently accepted for filing and must be dismissed.

4. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
Wilson	June 6, 1990
Pearce	July 18, 1990

5. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Wilson, by Circle, by Landmark, or by Wiregrass would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Wilson, by Circle, by Landmark, or by Wiregrass would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That the application filed by Hubcap Classics Radio Network, Ltd. IS DISMISSED.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Wilson and Pearce ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-519

In re Applications of

PATRIOT BROADCASTING COMPANY, INC. (hereafter "Patriot") File No. BPH-890504MC

BULLIE BROADCASTING CORPORATION (hereafter "Bullie") File No. BPH-890504MN

For Construction Permit
for a New FM Station on
Channel 284A in Hinesville, Georgia

HEARING DESIGNATION ORDER

Adopted: October 16, 1990; Released: December 19, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

6. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-504

In re Applications of

PLAYA DEL SOL BROADCASTERS (hereafter "Playa")	File No. BPH-890501MJ
COUNTRY CLUB COMMUNICATIONS, INC. (hereafter "Club")	File No. BPH-890503MC
CHRISTIAN SERVICE NETWORK, INC. (hereafter "Christian")	File No. BPH-890503MF
ANBILOG COMMUNICATIONS, INC. (hereafter "Anbilog")	File No. BPH-890503ML
VALDOVINA BROADCASTING, LIMITED PARTNERSHIP (hereafter "Valdovina")	File No. BPH-890503MO
MICHAEL DURDEN (hereafter "Durden")	File No. BPH-890503MP
COACHELLA VALLEY WIRELESS CORPORATION (hereafter "Coachella")	File No. BPH-890503MG (HEREIN DISMISSED)

For a Construction Permit for a New FM Station on Channel 249A (97.7 MHz) in Mecca, California

HEARING DESIGNATION ORDER

Adopted: October 16, 1990; Released: December 19, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Coachella.* A technical review of Coachella's application reveals that the North Latitude coordinates contained in Section V-G, FCC Form 301, (33^0 38' 32.5") do not agree with the North Latitude coordinates plotted on the applicant's topographic site map (33^0 38' *39.5*"). Consequently, a seven second discrepancy exists between the two sets of coordinates which the staff was unable to resolve confidently and reliably by drawing upon the application as a whole.

3. In the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission adopted a "hard look" approach as to certain critical elements that are essential to a determination that an application is "substantially" complete. This approach benefits the public interest by reducing frivolous and speculative applications and streamlines our processing procedures to make more efficient use of our staff and other resources. *See, e.g., Star Signal Corporation*, 1 FCC Rcd 450 (1986); *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). Further, in Appendix D to the *Report and Order, supra,* we stated that the absence of the geographic coordinates *to the nearest second* would prevent a determination of acceptability and thus renders the application not substantially complete. Thus, in the present case, the inconsistency in the North Latitude coordinates makes it impossible to determine either the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval. *See, e.g., Steven B. Courts*, 4 FCC Rcd 4764 (1989). Accordingly, we conclude that Coachella's application was inadvertently accepted for filing and will be dismissed.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
Anbilog	December 22, 1989
Durden	December 13, 1989

5. Since no determination has been received from the Federal Aviation Administration as to whether the antennae proposed by Club and by Christian would constitute hazards to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR

HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Club and by Christian would constitute hazards to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That the application of Coachella IS HEREBY DISMISSED.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Anbilog and Durden ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-502

In re Applications of

MICHELLE ELAINE HULSE, *ET AL.*
(hereafter "Hulse") File No. BPH-890526MG

BEN L. UMBERGER
(hereafter "Umberger") File No. BPH-890530MI

GEYER BROADCASTING CO., INC.
(hereafter "Geyer") File No. BPH-890530MJ

For Construction Permit
for a New FM Station
in Chandler, Indiana
Channel 228A (93.5 MHz)

ERRATUM

Released: December 19, 1990

By the Chief, Audio Services Division:

The *Hearing Designation Order* in MM Docket No. 90-502 (released November 15, 1990) erroneously conditioned a grant of the Geyer application on the outcome of a Commission Rule Making for Drakesboro, Kentucky. That proceeding in MM Docket No. 87-34, 4 FCC Rcd 8419 (released December 4, 1989) has terminated with the allotment of Channel 280A to Drakesboro. The Geyer application is not short-spaced to this proposed allotment, and, therefore, the condition is not applicable. The *Order* is hereby modified to delete paragraphs 4 and 10 and renumber the remaining paragraphs accordingly.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Pinewood, South Carolina)

MEMORANDUM OPINION AND ORDER

Adopted: October 26, 1990; Released: December 19, 1990

By the Commission:

1. The Commission has before it the Application for Review filed by Pinewood Broadcasting Partnership ("PBP") directed against the staff *Memorandum Opinion and Order*, 4 FCC Rcd 8536 (MM Bur. 1989), affirming an earlier staff letter dismissing its petition for rule making proposing the allotment of Channel 238A to Pinewood, South Carolina. Millennium Communications of Charleston, Inc. ("Millennium") filed an Opposition to the Application for Review. For the reasons discussed below, we deny the Application for Review.

BACKGROUND

2. This matter began with the filing of a petition for rule making by Millennium, licensee of Station WWWZ-FM, Channel 228A, Summerville, South Carolina, proposing the substitution of Channel 227C2 for Channel 228A at Summerville, and the modification of its license to specify operation on this higher powered channel. In response to this request, the staff adopted a *Notice of Proposed Rule Making* in MM Docket No. 88-145, 3 FCC Rcd 2189 (MM Bur. 1988), proposing the Channel 227C2 upgrade at Summerville and Station WWWZ-FM license modification. Thereafter, we received a timely counterproposal from Savannah Radio Partnership ("Savannah") proposing the allotment of Channel 227A to Summerton, South Carolina, as a first local FM service. However, after the close of the comment period, Millennium filed a "Motion for Leave to File Supplemental Comments." In that Motion, dated October 12, 1988, Millennium noted the availability of Channel 238A as an alternate channel for Summerton. On January 17, 1989, six months after the deadline for filing counterproposals in MM Docket No. 88-145, PBP filed its petition for rule making proposing the allotment of Channel 238A to Pinewood, South Carolina. On May 3, 1989, this petition for rule making was dismissed by staff letter due to a conflict with the possible Channel 238A allotment at Summerton, South Carolina.

3. PBP requested reconsideration of this action, contending that it was improper to dismiss its petition for rule making on the basis of a conflict with the use of Channel 238A at Summerton. Since Millennium suggested the use of Channel 238A at Summerton in supplemental comments filed after the comment period closed, PBP asserted that it was not afforded sufficient notice, as required by the Administrative Procedure Act ("APA"), that Channel 238A was being considered and that, in any event, its petition for rule making should be considered in conjunction with the Channel 238A proposal.

4. On reconsideration, PBP's arguments were rejected. The staff noted that, although Millennium had suggested the use of Channel 238A at Summerton in late-filed comments, this alternative had been independently considered by the staff. The fact that Millennium also advanced this alternative in a late filed pleading did not foreclose its consideration. The staff also determined that there was no violation of the APA because the *Notice* specifically stated that the filing of a counterproposal may lead the Commission to allot an alternate channel to any community in this proceeding.

APPLICATION FOR REVIEW

5. In support of its Application for Review, PBP again contends that it had no notice of a potential Channel 238A allotment at Summerton or any other proposal that could preclude its proposal for Channel 238A at Pinewood. As such, PBP argues that the dismissal of its petition for rule making was arbitrary and capricious and in violation of Section 553 of the Administrative Procedure Act which requires a rule making proceeding to provide adequate notice and a fair opportunity for interested parties to participate and present relevant information. 5 U.S.C. § 553. In this vein, PBP also argues that the staff reliance on *Owensboro on the Air v. United States*, 262 F.2d 702 (D.C. Cir. 1958), is misplaced because the aggrieved party in *Owensboro* had actual knowledge of the proposed action. PBP also reiterates the argument that its Pinewood proposal was precluded by an untimely counterproposal in MM Docket No. 88-145. Finally, PBP contends that dismissal of its petition for rule making was in conflict with Section 307(b) of the Communications Act because its proposal was for a first local FM service for Pinewood.

6. In its Opposition, Millennium argues that PBP misconstrues the facts with respect to the alternate allotment of Channel 238A at Summerton, and had ignored the Commission's practice of searching for alternate channels in allotment proceedings. Millennium also contends that the procedure of searching for alternate channels meets the "logical outgrowth" test for compliance with the notice requirement of the APA. Therefore, Millennium asserts that the PBP petition for rule making was properly dismissed and excluded from consideration in MM Docket No. 88-145.

DISCUSSION

7. For the reasons discussed below, a possible Channel 238A allotment at Summerton was, for purposes of the notice provisions of the APA, within the scope of the notice in MM Docket No. 88-145. PBP's conflicting proposal to allot Channel 238A to Pinewood was not timely in that proceeding and was, therefore, properly dismissed.

8. As stated earlier, the staff adopted a *Notice* proposing a Channel 227C2 upgrade at Summerville, South Carolina, and invited the filing of counterproposals and/or comments no later than June 6, 1988.[1] In response to the *Notice*, Savannah submitted a timely counterproposal proposing a Channel 227A allotment at Summerton, South

Carolina.[2] At that juncture, Summerton became part of MM Docket No. 88-145 and the standard procedure is to search for alternate channels for both communities. Because a notice of proposed rule making in a channel allotment proceeding specifically elicits counterproposals and alerts all interested parties that alternate channels may be substituted for either the original proposal or the counterproposal, both the actual counterproposal advanced by the proponent and any alternate channel are within the scope of the notice. [3] Parties contemplating the filing of a petition for rule making that may conflict with an alternate channel for the original community or a community that may be specified in a counterproposal must do so by the comment date in order to have their proposal considered as part of that proceeding. We are not required by the Administrative Procedure Act to issue separate *Notices* for every channel under consideration.[4] *See Medford and Grants Pass, Oregon*, 45 RR 2d 359; *Pensacola, Florida*, 62 RR 2d 535 (MM Bur. 1987). *See also Owensboro on the Air v. United States, supra*. We have elicited counterproposals and announced the possibility of allotting alternate channels to any community in MM Docket No. 88-145. The fact that we may allot an alternate channel to Summerton or any community in that proceeding, which in turn, would cause the exclusion of the Pinewood proposal as an untimely conflicting proposal from the proceeding, is merely doing that which we announced that we could do. As such, this procedure meets the "logical outgrowth" test applied by the Court of Appeals to determine whether a rule making action was based on adequate notice and opportunity for public participation. *See Weyerhaeuser Company v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978); *Owensboro on the Air v. United States, supra*.

9. This situation is also distinguishable from *Ponte Vedra Beach, Florida*, 4 FCC Rcd 843 (1989), *recon. granted on other grounds*, 4 FCC Rcd 5369 (1989). In that case, the Bureau held that it was not proper to deny a timely filed counterproposal on the grounds that the suggested channel could be used to eliminate a conflict between two separate rule making petitions that had been neither placed on Public Notice nor been the subject of public comment during the pendency of the allotment proceeding. Because there was no notice to the proponent of the counterproposal that its alternative channel for Ponte Vedra could be precluded by these petitions, the Bureau concluded that to deny the counterproposal was inconsistent with the statutory obligation to provide parties a meaningful opportunity to file comments in a rule making proceeding. In the instant case, however, PBP's proposal was not dismissed because of a conflict with rule making proposals of which it could have had no notice. On the contrary, the release of the *Notice of Proposed Rule Making* in MM Docket No. 88-145 placed PBP on constructive notice that a rule making proceeding was occurring regarding Summerton and Summerville and that an alternative, potentially preclusive, allotment could occur.

10. We also reject PBP's argument that its petition for rule making was improperly returned because our decision to do so was based on an untimely submission by Millennium. Millennium did suggest the substitution of Channel 238A for Channel 227A at Summerton as a means of resolving the conflict between Millennium's initial proposal to add Channel 227C2 at Summerville and Savannah's timely counterproposal to add Channel 227A at Summerton. It is also true that Millennium filed this suggestion after the close of the comment period in the Summerville allotment proceeding. These facts, however, are irrelevant. As we have stated earlier, the notice of proposed rule making in an allotment proceeding affords by its express terms and by our longstanding practice notice to all that any substitute channel may be selected by the Commission to resolve conflicts between the initial proposal and any timely filed counterproposals. Neither the source nor the timing of a specific channel substitution proposal affects the legitimacy of a channel substitution or the adequacy of the APA notice afforded by the underlying notice of proposed rule making that such a substitution could be made.[5] To avoid possible preclusion by this necessary substitution process, other applicants must file by the comment deadline stated in the notice of proposed rule making in the allotment proceeding. PBP did not do so.

11. Even if we were to accept the late-filed submission by Millennium and dismiss the PBP petition for rule making on the basis of the suggestion advanced by Millennium, this would not be unfair to PBP. The proposals for Summerville and Summerton are in a different procedural posture than the proposal for Pinewood. After the counterproposal deadline, we believe it is appropriate for a party in a proceeding to suggest alternate channels which may lead to a resolution with respect to the communities already at issue in the proceeding. In contrast, we believe it is not appropriate, after the counterproposal deadline, for a non-party to offer a new suggestion regarding a new community not previously at issue in the proceeding.

12. Dismissing the PBP petition for rule making proposing Channel 238A for Pinewood did not contravene our obligation under Section 307(b) of the Communications Act to "provide a fair, efficient, and equitable distribution of radio service." Section 307(b) does not preclude us from setting deadlines by which proposals must be filed. *Cf. Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, n.9 (1945). We continue to believe that the continuous filing of proposals without regard to a cut-off date is not conducive to the efficient transaction of Commission business and would delay service to the public. In order to have its petition for rule making for Pinewood considered in conjunction with MM Docket No. 88-145, PBP was required to submit its proposal by June 6, 1988, the comment deadline in that proceeding. Had it done so, PBP's Pinewood proposal would have been eligible for comparative consideration under the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), and Section 307(b) of the Act. The untimeliness of the Pinewood proposal now requires that PBP await the outcome of MM Docket No. 88-145. If Channel 238A is not assigned to Summerton, PBP may then resubmit its petition for rule making proposing Channel 238A for Pinewood.

13. Accordingly, IT IS ORDERED, That the aforementioned Application for Review filed by Pinewood Broadcasting Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 1.420(d) of the Commission's Rules requires that counterproposals be advanced by the comment date.

[2] Public Notice of the counterproposal was given on June 15, 1988 (Report No. 1734).

[3] In addition, paragraph 3(c) of the Appendix to the *Notice* specifically alerted interested parties that a filing of a counterproposal may lead the Commission to allot a different channel than that which was originally proposed to any community in this proceeding. This paragraph provides additional notice to interested parties concerning the possibility of allotting alternate channels. Contrary to the argument advanced by PBP that Channel 238A had not been allotted, there is no requirement that a channel actually be allotted in order for this paragraph to provide the requisite notice. Moreover, the APA does not require the identification of the actual channel. In fact, there is no way to know all the possible channels in advance. *See Medford and Grants Pass*, 45 RR 2d 359 (1979).

[4] The argument that the Bureau improperly relied upon *Owensboro*, *supra*, is not well taken. Although the aggrieved parties in *Owensboro* had actual notice of the deletion of a VHF channel for which they had submitted applications, the Court pointed out that, under the APA, sufficient notice can also occur if there is a description of the subjects and issues involved in the rule making proceeding to notify parties of the opportunity to participate. *See Owensboro*, *supra*, 262 F.2d at 707-708. As described above, the *Notice* alerted parties that different channels may ultimately be allotted in the event that counterproposals were filed.

[5] Indeed, the staff, on its own initiative, typically investigates and implements channel substitutions to resolve allotment conflicts on a routine basis. In this particular case, the staff had identified Channel 238A as a viable solution to the Summerville-Summerton conflict and had entered the channel in the Commission's FM data base on July 15, 1988 -- nearly three months prior to the filing of Millennium's substitution proposal and six months before PBP filed its petition for rule making. Accordingly, the PBP proposal would have been dismissed even if the Millennium submission had never been filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-21

In re Applications of

FRESNO FM LIMITED PARTNERSHIP	File No. BPH-861230MB
JOHN MARSHALL HOOKER d/b/a JMH BRODCASTING	File No. BPH-861230ME
JOHN EDWARD OSTLUND	File No. BPH-861231MD
VALLEY RADIO LTD., A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-861231ME
LAURA H. NORMAN	File No. BPH-861231MI

For Construction Permit for a
New FM Station on Channel 257A,
Fresno, California

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 1990; Released: December 19, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. In our prior order in this case, *Carta Corp.*, 5 FCC Rcd 3696 (Rev. Bd. 1990), the Board (1) determined that the ownership/management "integration" credited to the applicant recommended in the initial decision was unwarranted; and (2) that the amendment request of the runner-up specified in the initial decision, Carta Corp., would require an evidentiary hearing. Accordingly we remanded to the ALJ to test the "integration" substitution proposed by Carta Corp.

2. Since the issuance of that remand order, several events have occurred that change significantly the complexion of this case. First, while before the ALJ upon our remand, Carta Corp. withdrew its application, which application the ALJ dismissed with prejudice.[1] Second, the application for review of our remand order filed by Fresno FM Limited Partnership was, on November 27, 1990, denied by the full Commission. [2]

3. As we have perused again the exceptions originally filed against the initial decision and the transcript of the oral argument before the Board on those exceptions, it appears (not unnaturally) that the thrust of the arguments was directed principally against the applicant prevailing below, Fresno FM Limited Partnership. Much was also made of the amended integration proposal of Carta Corp, the runner-up. And, it follows, that none of the pleadings address extensively (if at all) the relative comparative standings, *inter sese*, of the respective applicants, Carta Corp. and Fresno FM Limited Partnership excluded.[3]

4. It would be helpful to have the parties' supplemental pleadings setting forth their individual views on their current *comparative* standing *vis a vis* each of the others, supported by appropriate citation to the record and case precedent. Parties need not repeat argumentation contained in their exceptions or replies, and may not add to, or alter, prior exceptions, except to clarify their relative *comparative* standing under the changed circumstances we have noted.

5. ACCORDINGLY, IT IS ORDERED, Pursuant to authority delegated under 47 CFR § 0.361(a), that, in accordance with 47 CFR § 1.276(c)(2), the parties ARE DIRECTED to file supplemental briefs not to exceed ten (10) pages within fifteen (15) days of the release of this ORDER. Reply briefs not to exceed ten (10) pages MAY BE FILED no later than ten (10) days thereafter.[4]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] *Memorandum Opinion and Order*, FCC 90M-2847 (ALJ, released August 13, 1990).

[2] *Memorandum Opinion and Order*, FCC 90-397 (Comm'n, released December 5, 1990). Although Fresno FM's application for review was procedurally defective on its face, the Board deferred further action on this proceeding, both because Fresno FM had been found to be the comparatively superior applicant by the ALJ and because the Commission occasionally addresses the merits of an interlocutory review application, despite procedural defects. *See, e.g., Video 44*, 103 FCC 2d 1204 (1986). As a matter of deference to the Commission, as well as for obvious practical reasons, the Board will generally hold in abeyance a proceeding subject to an interlocutory application for review, lest a full rehearing be necessitated by a grant of that application. *Cf. WCVQ, Inc.*, 5 FCC Rcd 3824 (1990) (Comm'n remand for further hearing after issuance of initial decision, where ALJ had not held case in abeyance pending disposition of review application).

[3] Fresno FM, of course, remains a party to the case and preserves all of its rights to appeal any final Board decision. However, we have treated with Fresno FM's own application in our prior remand order, and will not revisit those determinations.

[4] Given the delay occasioned by events occurring since the filing of exceptions, no extensions of time are contemplated. Should the parties contemplate settlement negotiations in lieu

of, or after, the filing of the supplemental pleadings, the Board shall be notified forthwith, and it shall then schedule progress reports.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-442

In re Applications of

MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT — File No. BPED-860624MC

ARIZONA BOARD OF REGENTS FOR ARIZONA STATE UNIVERSITY — File No. BPED-870626MC

For Construction Permit for
New Noncommercial Educational FM
Broadcast Station, Channel 208A,
Phoenix, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: December 11, 1990; Released: December 26, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. The Review Board has before it the *Initial Decision*, 5 FCC Rcd 4081 (ALJ 1990) ("*I.D.*"), in the above-captioned case. Therein, and pursuant to the noncommercial comparative issue expressly specified by the Commission, presiding Administrative Law Judge Richard L. Sippel ("ALJ") ordered that the two remaining applicants, Maricopa County Community College District ("Maricopa") and the Arizona Board of Regents for Arizona State University ("ASU"),[1] share-time on the single FM broadcast frequency here available.[2] In so doing, the ALJ followed the principle established by the Board in the seminal case of *New York University*, 19 FCC 2d 358 (Rev. Bd. 1969), where the Board found both NYU and its competitor, Fairleigh Dickinson University, fully qualified to be noncommercial permittees.

2. In the contest at bar, both Maricopa and ASU are sizeable, publicly-supported institutions of secondary education.[3] Although both of our applicants propose a "fine arts" format (partaking heavily of classical music, so as to relieve a void created by a KONC format change), both schools have filed extensive exceptions to the ALJ's order to share time on the frequency, and each respectively asks the Commission to decide that it, rather than the other, is better qualified to steward the new noncommercial FM broadcast station.

3. However, whereas Maricopa:[4]

> firmly believes that an exclusive grant of the authorization to Maricopa County would best serve the public interest, convenience and necessity, given the amorphous nature of the noncommercial comparative criteria and the Commission's history of ordering share-time arrangements in these types of proceedings, *it would if ordered to do so, accept a share - time proposal.*

ASU, on the other hand, has not indicated in its pleadings that it would uphold its end of any share-time grant to it; and, at oral argument, ASU counsel represented that ASU has not yet decided whether it would accept a share-time grant.

4. Given the twin premises that, (1) where the Review Board has before it a "record that clearly shows that both proposals are meritorious and that the public would be well served by the program offerings of both," a share-time grant "permits the less drastic solution of denying and granting in part *both* applications," *New York University*, 19 FCC 2d at 374 (emphasis added); and (2) that the share-time order of the ALJ was pronounced after a full record on both applicants was compiled in an *Initial Decision* that is quite beyond "a mere report," *Stereo Broadcasters Inc.*, 652 F.2d 1026, 1030 (D.C. Cir. 1981), the administrative momentum would appear, at this juncture, to favor a share-time grant to both applicants.

5. In fact, the *Hearing Designation Order*, 3 FCC Rcd 5637 (1988), under which we here proceed, has specified a sub-issue "[t]o determine . . . whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and if so the terms and conditions thereof." Plainly, then, it would be unproductive to review the terms and conditions of the ALJ's share-time determination, affirm or revise those terms, in the absence of an indication from ASU that it would accept such a grant. Hence, we hereinbelow order ASU to advise the Board, without equivocation, whether it will accept an equitable share-time grant under terms and conditions to be negotiated by the parties (discussed next *infra*), or whether it will abide only by an exclusive grant to one of the two remaining applicants before us. We will not further review the exceptions to the ALJ's share-time order, or attempt to resolve the aforecited sub-issue, until ASU indicates whether it will uphold any mutually beneficial share-time grant.[5]

6. In that regard, and as in *New York University*, "the Board does not anticipate that a share-time decision here can be effectuated without some problems arising," 19 FCC 2d at 376[6] that, as there, time ought to be afforded to the applicants to negotiate an agreement that differs from the instant *I.D.*, should ASU indicate that it will accept a mutually amenable share-time grant. Nothing in the ordering clause of the *I.D.* (*supra* note 2) is engraved upon the alabaster pediments of either institution, and the parties are welcome to negotiate a share-time grant that varies from the alternate-day formula prescribed in the *I.D.* (*e.g.*, joint operation under a cooperative entity), so long as the imperatives of responsible control over the facility are satisfied.[7]

7. ACCORDINGLY, IT IS ORDERED, That Arizona Board of Regents for Arizona State University IS DIRECTED to file within forty-five (45) days of the release

date of this opinion a statement consistent with paragraph 5 herein regarding its willingess to negotiate toward a share-time grant; and

8. IT IS FURTHER ORDERED, That should Arizona Board of Regents for Arizona State University agree to negotiate toward a share-time grant and so notify the Board, the parties ARE AFFORDED an additional forty-five (45) days from the date of said notification to submit a share-time arrangement under such terms and conditions as they shall mutually agree upon.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Two other mutually exclusive applicants for the channel, Radio Alliance Phoenix and Sun Health Corporation, have been dismissed for failure to prosecute by prior orders.

[2] More specifically, the ALJ held that (5 FCC Rcd at 4094-95):

> IT IS FUTHER ORDERED that the application of Maricopa County Community College District (File No. BPED-870624MC) and the application of Arizona Board Of Regents for Arizona State University (File No. BPED-870626MC) for authority to construct a new FM educational broadcast station on Channel 208A at Phoenix, Arizona ARE GRANTED, except that the two parties shall share the same frequency and, unless they can agree otherwise before a final Commission order, Maricopa County Community College District IS AUTHORIZED to operate on Monday, Wednesday, Friday and on alternate Sundays, and Arizona Board Of Regents for Arizona State University IS AUTHORIZED to operate on Tuesday, Thursday and Saturday and on alternate Sundays.

[3] Maricopa has "roughly 80,000 students enrolled in college credit courses . . . and 20,000 students enrolled in noncredit," *I. D.*, para. 13, while ASU "has a current enrollment of over 40,000." *Id.*, para. 46.

[4] Maricopa Exceptions at 3 (emphasis added).

[5] We recognize, of course, that ASU preserves its exceptions which argue that it is better entitled to an exclusive grant; and we assure ASU that no prejudice will accrue to it, should it advise that it will not accept a share-time grant under any circumstances. We further acknowledge that, in *Southeastern Bible College, Inc.*, 85 FCC 2d 936 (Rev. Bd. 1981), the Board ordered a share-time grant, even where one of the applicants announced it would not participate. Should we be advised by ASU that it will not accept a share-time grant, we will respect its representation and make an exclusive grant to one of the applicants here.

[6] In that connection, and while ASU asserts that share-time arrangements are regarded by its expert, Dr. Donald P. Mullally, as generally "unsatisfactory," its expert did report that "NYU appeared to be operating satisfactorily under a time-sharing arrangement." ASU Exceptions at 11. We also observe that, whereas both applicants argue that the public interest would be best served by an exclusive grant to it, and ASU's expert opines as to the "unsatisfactory" nature of share-time operations, the perspective adopted by both applicants is that of the *applicants*. ASU's exceptions do not indicate whether share-time operations are satisfactory to *the public*, and neither party appears to recognize that the public interest of paramount concern to the Commission may not coincide with the preferences of the applicants. The public interest to be served in these quarters is "outer," not "inner," directed. *See generally Seattle Public Schools*, 4 FCC Rcd 625, 632, 641 (Rev. Bd. 1988); *cf Red Lion Broadcasting* Co. v. FCC, 394 U.S. 367 (1969) (interest of listeners, not operators, is supreme). Finally, we note that, unlike the case with *Southeastern Bible College, Inc.*, 85 FCC 2d 943, 953-954 (ALJ 1980), where religion-based operational proposals threatened the harmony of a share-time arrangement, we find that the applicants before us more closely resemble the secular institutions in *New York University*.

[7] *See generally Trustees of the University of Pennsylvania*, 69 FCC 2d 1394 (1978), *recon. denied*, 71 FCC 2d 416 (1979).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American
Telephone and Transmittal No. 2554
Telegraph
Company

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 6, 1990; Released: December 7, 1990

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2554 to introduce Virtual Telecommunications Network Service (VTNS) Option 65 by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for this option are stabilized throughout a three-year term. *See* AT&T Transmittal No. 2554, Description and Justification (D&J) at 1-4. The basic charge for Option 65 is $806,500 per month. Transmittal No. 2554 is scheduled to become effective December 10, 1990.

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate Transmittal 2554 on September 26, 1990. AT&T filed a reply on October 5, 1990.

3. Sprint argues that AT&T has failed to demonstrate that Option 65 is an integrated service package that is "unlike" AT&T's other component services. Further, Sprint contends that even if Option 65 could qualify as an integrated service package, the rates contained in the Option vary without justification from rates contained in other options under Tariff 12 and are thus discriminatory. Sprint Petition at 1-2. Moreover, Sprint contends that AT&T's provision of 68 individual VTNS offerings makes clear that each such offering is designed for one customer. Additionally, Sprint maintains that various specifications in the transmittal also effectively restrict the offering to one customer. Sprint further argues that the individualized pricing of VTNS options is comparable to the local exchange carriers' individual case basis (ICB) rates for DS3 service, that AT&T now has sufficient experience to cease its individualized pricing and develop general rates, and that the Commission thus should order AT&T to offer these rates under a generally available tariff, as it did in the ICB DS3 case. *Id.* at 2-4. Additionally, Sprint alleges that AT&T's projected 1990 revenue from all Tariff 12 VTNS options now exceeds $1.2 billion and likely accounts for more than 2 percent of the entire interexchange telecommunications service market. *Id.* at 4. Sprint also alleges that AT&T's cost support for Option 65 is "seriously deficient" and incorporates by reference the arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively). *Id.* at 5 & n.5.

4. AT&T contends that the rates in Option 65 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered by AT&T in separate tariffs. AT&T Reply at 3. AT&T also argues that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. AT&T contends that these costing methods satisfy the requirements of Section 61.38 of the Commission's Rules. *Id.* at 6-7 & 7 n.*.

5. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2554, Sprint's petition, and related pleadings. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

6. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although this transmittal does not present new questions that warrant investigation at this time, it could be affected by the Commission decision in the CC Docket 87-568 remand proceedings. Accordingly, Transmittal No. 2554 is accepted subject to the outcome of the remand proceedings in CC Docket 87-568.

7. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2554, filed by US Sprint Communications Company Limited Partnership IS DENIED.

8. IT IS FURTHER ORDERED that Transmittal No. 2554 takes effect subject to the outcome of remand proceedings in CC Docket 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 10, 1990

COMMON CARRIER BUREAU SOLICITS COMMENTS REGARDING MODIFICATIONS AND IMPROVEMENTS TO THE TARIFF REVIEW PLAN

To aid our review of the required annual revisions of the local exchange carriers' (LECs) interstate access tariffs, the Common Carrier Bureau has developed Tariff Review Plans (TRPs). TRPs specify certain information that LECs must file in a uniform format. In each of the last five years, the Bureau has prepared TRPs, after consultation with the LECs and their customers, reflecting both the specific information needed in light of changes in relevant Commission rules and policies and the most effective and least burdensome methods of supplying this information. The TRPs developed through this process are subject to approval by the Office of Management and Budget in accordance with the provisions of the Paperwork Reduction Act, 44 U.S.C. §§ 3506 et seq.[1]

In preparation for the 1991 annual access tariff filings, currently scheduled to be filed on April 2, 1991, the Bureau is examining changes in the TRP necessary to reflect recent rule changes and other events, and our experience in using TRPs. The most significant rule change for the 1991 annual access tariff filings is the institution of price cap regulation for many LECs. This rule change substantially alters the type and quantity of data required for the TRP filed by those LECs.

Under Section 61.38(b) of the Commission's Rules, LECs which are not subject to price cap regulation are required to file a cost of service study for the most recent 12-month period, and a study containing a projection of costs for a representative 12-month period.[2] Under Section 61.41 through Section 61.49 of the Commission's Rules, LECs subject to price cap regulation must make tariff filings accompanied by data sufficient to calculate the price cap index (PCI), average price index (API), and service band index (SBI). Separate TRPs will be needed for price cap and non-price cap LECs to implement these differing data requirements.

The rules adopted in the *LEC Price Cap Order* allow companies currently in National Exchange Carrier Association pools to withdraw from those pools and to elect price caps effective on July 1, 1991. [3] The *LEC Price Cap Order* also delegated to the Bureau authority for developing a method for companies to leave the pools and move directly to price cap regulation.[4] Our proposed method is to have those companies withdrawing from Association pools base rates on, and provide documentation of, actual costs and demand for July 1, 1990 through December 31, 1990 for initial traffic sensitive rates, and costs and demand for this period adjusted for recent trends in common line costs and demand for initial common line rates. These figures shall be adjusted to the allowed 11.25 percent rate of return, and further adjusted for the Subscriber Plant Factor (SPF) changes, Dial Equipment Minute (DEM) changes, and any other exogenous changes that will occur on January 1, 1991. The rates developed in this way would then be used as the starting rates for price caps.

As we have in the past, the Bureau wishes to obtain the views and advice of customers and other interested persons in order to develop any needed modifications and improvements in the TRP. In order to adopt a final TRP as far in advance of the annual access tariffs filing date as possible, and to enable the TRP to provide the information needed by the Commission to conduct its review of the tariffs in accordance with the Communications Act, the Bureau has determined that an expedited and informal procedure would be most useful.

Interested persons wishing to express their views regarding modifications and improvements to the TRP may do so by letter addressed to the Chief, Tariff Division, Common Carrier Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 518, Washington, D.C. 20554. We invite comment on the form the TRP should take both for carriers subject to price cap regulation and for carriers subject to the rate of return rules. We also invite comment on our proposed method for initializing price cap rates for companies which are withdrawing from any pools, and on the form of the TRP for these carriers. These comments should be received no later than December 26, 1990, to allow the Bureau an opportunity to consider them. No reply comments will be considered.

For further information, contact Chris Frentrup (202) 632-6312 of the Common Carrier Bureau, Tariff Division.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTES

[1] The 1990 TRP, adopted in Commission Requirements for Cost Support Material To Be Filed with 1990 Annual Access Tariffs, DA 90-274, Order, released Feb. 26, 1990, bore OMB Approval Number 3060-0400.

[2] Reduced filing requirements apply to small telephone companies, defined as National Exchange Carrier Association (NECA) Subset 3 carriers which provide fewer than 50,000 access lines. These small companies are allowed to file every other year and may elect to base their rates on historical costs for the entire period since their previous filing. *See* 47 C.F.R. § 61.39(b).

[3] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, FCC 90-314, released Oct. 4, 1990 (*LEC Price Cap Order*). *See also* 47 C.F.R. § 69.3(i)(1).

[4] *LEC Price Cap Order* at para. 270.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

ORDER

Adopted: December 7, 1990; Released: December 10, 1990

By the Chief, Common Carrier Bureau:

1. On October 4, 1990, the Commission released its Second Report and Order in the above-captioned proceeding.[1] Petitions to reconsider this Order were filed on November 19, 1990, by twenty-seven parties. On December 4, 1990, MCI Telecommunications Corporation (MCI) filed a motion for extension of time for responsive pleadings to those petitions. In this Order we grant MCI's motion.

2. MCI argues that the number of petitions and the number and complexity of issues involved mean that it would be impossible for MCI to evaluate the petitions and respond meaningfully in the very short time period established. MCI also notes that respondents had more time to respond to fewer petitions in the reconsideration proceeding following release of the *AT & T Price Cap Order*.[2] MCI also urges that the public interest and the protection of the ratepayer require that oppositions in this proceeding be complete and carefully prepared.

3. We believe that MCI has shown good cause why the filing date for oppositions in this proceeding should be extended to December 21, 1990, and the filing date for replies should be extended to January 7, 1991. We do not, however, anticipate any further extensions of time for these filing dates.

4. Accordingly, pursuant to Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, IT IS ORDERED that the Motion for Extension of MCI Telecommunications Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, FCC 90-314, released Oct. 4, 1990 (*LEC Price Cap Order*).

[2] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order, 4 FCC Rcd 2873 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Transmittal No. 337
Telephone Companies
Revisions to Tariff F.C.C. No. 4

Common Channel Signalling
Access Service

ORDER

Adopted: December 12, 1990; Released: December 12, 1990

By the Chief, Common Carrier Bureau:

1. On September 14, 1990, BellSouth Telephone Companies (BellSouth) filed Transmittal No. 337, to offer a new out-of-band signalling option available with Feature Group D access service. Out-of-band signalling involves the transmission of signalling information over a packet switching network called the Common Channel Signalling (CCS) network. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 337, and BellSouth replied. Transmittal 337 is scheduled to become effective on December 13, 1990.

2. Under Transmittal 337, BellSouth would require interexchange carriers (ICs) desiring out-of-band signalling service to interconnect with one of BellSouth's signal transfer points (STPs), which are packet switches designed to operate with the Signalling System 7 (SS7) protocol. Transmittal 337 Description and Justification (D&J) at 1-4. BellSouth plans to interconnect its CCS network with all its access tandems and a "substantial number" of end offices by 1993. *Id.* at 1-6. BellSouth does not plan to charge for its out-of-band signalling service. Rather, BellSouth intends to recover the costs of out-of-band signalling service through Feature Group D charges as a general network upgrade. *Id.* at 2-1 through 2-2. ICs ordering Feature Group D service with out-of-band signalling would be charged BellSouth's current Local Transport Installation Charge. BellSouth also plans to set the charge for converting existing Feature Group D service to Feature Group D with out-of-band signalling at half the Local Transport Installation Charge. *Id.* at 2-4. Finally, BellSouth claims that the introduction of out-of-band signalling will not affect existing Switched Access rates. *Id.* at 3-1.

3. MCI claims that it should be allowed to connect to BellSouth's CCS network at end offices, access tandems, or signal control points.[1] MCI Petition at 2-3. MCI also criticizes BellSouth for not planning to support Feature Group B service with out-of-band signalling. *Id.* at 4. MCI further considers several portions of BellSouth's tariff to be vague, and criticizes references in BellSouth's tariff to Bellcore Technical Publication TR-TSV-000905. *Id.* at 4-6. Finally, MCI argues that BellSouth has not adequately supported its out-of-band signalling installation charge or its out-of-band conversion charge. *Id.* at 7.

4. BellSouth replies that MCI is protesting Transmittal 337 only to disadvantage other ICs interested in using BellSouth's out-of-band signalling service. BellSouth Reply at 1-3. BellSouth discounts MCI's criticism concerning interconnection to the CCS network only through STPs, rather than service switching points, because MCI admits that interconnection at service switching points for signalling is not yet technologically possible. *Id.* at 4. BellSouth also maintains that the unavailability of out-of-band signalling with Feature Group B service is not sufficient reason to delay Transmittal 337. *Id.* at 4-5. BellSouth further refutes MCI's claims that its tariff is vague, and states that it is not unusual to refer to technical publications in tariffs. *Id.* at 5-8. Finally, BellSouth asserts that the charge to convert from in-band signalling to out-of-band signalling is the existing charge for adding or discontinuing any of the nonchargeable features of Feature Group D service. *Id.* at 9, *citing* BellSouth Tariff F.C.C. No. 4, Section 6.7.1(c)(3)(C).

5. The Common Carrier Bureau has reviewed BellSouth's transmittal and the associated pleadings and concludes that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to suspend and investigate BellSouth Telephone Companies, Revisions to Tariff F.C.C. No. 4, Transmittal 337, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] "Signal control points" are databases which can be used to provide 800 database service or credit card validation through the line identification database.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

COOKE CABLEVISION, INC.	CSR-3407
Juneau, Alaska	AK0001

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 1990; Released: December 20, 1990

By the Chief, Mass Media Bureau:

1. On May 25, 1990, a "Petition for Special Relief" was filed on behalf of Cooke Cablevision, Inc. ("Cooke"), operator of a 6,000 subscriber cable television system serving Juneau, Alaska. An opposition to this petition was filed May 30, 1990, by Alaska 13, Inc., licensee of Television Broadcast Station KJUD (Channel 8), Juneau, Alaska, and Cooke filed a reply to it on June 19, 1990.

2. In its petition, Cooke notes that KJUD, which it carries, broadcasts programs from both ABC and from NBC, and KJUD has requested network nonduplication protection for these programs against two stations licensed to Denver, Colorado, which are also carried by Cooke: KUSA-TV (ABC, Channel 9), and KCNC-TV (NBC, Channel 4).[1] In support of its request for waiver of the network nonduplication rules (§76.92-§76.97 of the Commission's Rules), Cooke submits a programming schedule for the three stations for March 29, 1990, and states that on ". . . a typical day this spring, Cooke was required to delete 13.5 hours from KUSA and 5.5 hours from KCNC . . . ." Cooke also notes that KJUD sometimes requests nonduplication protection for programs which it tape-delays, and that it sometimes airs programs, such as "Young Riders" and "Father Dowling Mysteries," on a different day than do the Denver affiliates. According to Cooke, this situation of "checkboard" deletions causes it such serious operational and marketing problems[2] that it would normally drop the distant Denver stations, but for the fact that this action would deprive its subscribers of the remaining network programs, which Cooke states are usually available to other cable subscribers in less remote areas of the county.

3. In response, KJUD submits an affidavit from B. G. Randlett, Senior Vice President of Statewide Operations for Alaska 13, Inc., and argues that it provides a good quality signal to Cooke's headend via a dedicated hardwire link, but that this signal is degraded (as is that of KTOO-TV) by Cooke's system, which suffers from corrosion and other problems, including improperly installed converters. Moreover, according to KJUD, Cooke already failed to provide it the requisite nonduplication protection on three different occasions. [3] KJUD also notes that it previously carried CBS programming until May 1988, when it deleted those programs, at the cable system's request, to enable the cable system to retransmit that network in its entirety. Although KJUD submits no financial data, it argues that Juneau's population is less than 20,000 people ". . . which is far too small to support a television station." However, KJUD adds that the Commission has previously recognized the severe impact that distant signal importation can have on a local affiliate. *Report and Order in Gen. Docket No. 87 - 24*, 3 FCC Rcd 5299, 5319 (1988). Moreover, according to KJUD, the Commission has also previously addressed the issue of tape-delay broadcasts, as well as satellite delivery of network signals and, nevertheless, decided that provision of network nonduplication protection in these types of situations would serve the public interest. Citing the Commission's decision in its *Memorandum Opinion and Order in Gen. Docket No. 87 - 24*, 4 FCC Rcd 2711, 2727 (1989), KJUD states that the Commission explicitly considered circumstances such as the present case and provided for prior notice to cable operators in the event that ". . . the local affiliate does not in fact carry network programming during the hours previously requested for protection." Finally, KJUD argues that, unlike Cooke's cable system, KJUD provides both local news and public affairs programs. KJUD suggests Cooke utilize the channel space made available by its network nonduplication requests to add a greater diversity of programs such as those available from the Fox affiliates.

4. In its reply, Cooke states that it already has spent approximately $3,000 to acquire switching equipment to enable it to delete both KUSA-TV and KCNC-TV, and that ". . . its employees diligently program this equipment to blackout the protected programming." In addition, Cooke maintains that the program schedules received from KJUD and from KUSA-TV failed to indicate that KUSA-TV was, in fact, going to air any of the three programs at issue within the nine-day period of protection (two days before/seven days after) specified by KJUD's ABC network affiliation agreement.[4] Cooke also reiterates its contention that ". . . any deficiencies in KJUD's signal on the cable system are attributable to KJUD's own transmission, rather than Cooke's carriage of that transmission." Finally, Cooke notes that KJUD survived prior to January 1, 1990, without the benefit of nonsimultaneous protection of its network programming. According to Cooke, the station will continue to survive without this increased protection simply because it is the only commercial television station licensed to Juneau. Although Cooke acknowledges that the Commission may have already addressed the issue of nonduplication protection for tape-delayed broadcasts of one network feed, it maintains that the Commission has not yet specifically extended this protection to stations with more than one network affiliation and that doing so in this instance will only enrich KJUD's coffers at the expense of the general viewing public.

5. As the Commission noted when it adopted its *Report and Order in Gen. Docket No. 87 - 24*, 3 FCC Rcd at 5319, nine network affiliated broadcast stations are now being distributed via satellite throughout the county. In so doing, the Commission also noted that the adverse effects of distant signal importation on a local station's audience had previously been demonstrated in the case of Station KMIR-TV, Palm Springs, California, which lost about half of its sign-on to sign-off audience when a local cable system was allowed to import another network affiliate from a larger market. In view of these developments, the Commission concluded that it remains necessary to have, not only an effective nonduplication rule, but also one

which is not limited in scope to any particular period of time. *Id.* To the extent that the issue of stations with multiple network affiliations has not been explicitly addressed previously, it should be noted that these are often precisely the stations most in need of program exclusivity protection either because they are relatively new or because, as here, they are the only commercial stations serving a particular television market. Naturally, this factor alone substantially raises the public interest considerations inherent in preserving their existence, both for the benefit of residents who do not subscribe to cable, as well as for the benefit of cable subscribers, who still generally receive their news, weather, and other programs of local interest from their local broadcast station.

6. In the present case, neither Cooke nor KJUD have submitted any relevant financial data to the Commission, except for Cooke's statement that it has already purchased the necessary switching equipment for approximately $3,000. The rest of Cooke's brief for waiver basically consists of two factors. The first factor is that of a certain unspecified amount of subscriber dissatisfaction, as exemplified by the letter from Mr. Stan Hungerford. The Commission has previously recognized the potential for this situation in the following statement regarding its prior syndicated exclusivity provisions: "By their very nature, enforcement of the syndicated program exclusivity rules often causes some disruption of established viewing habits . . . . Therefore, subscriber disruption is not, in itself, sufficient grounds upon which to grant waiver." *Metro Cable Co.*, 64 FCC 2d 605, 607 (1977). This principle remains valid today with respect to the present program exclusivity provisions, including both syndicated exclusivity and network nonduplication. The second factor Cooke raises in support of its waiver request is simply that it prefers to retransmit the distant Denver affiliates without any of the deletions required by the rules rather than to comply with them. This, however, is also insufficient basis for waiver of the rules. Our program exclusivity rules are designed to ". . . increase the diversity of programming options available to the public." *United Video, Inc. v. FCC*, 890 F. 2d 1173, 1181 (D. C. Cir. 1989). Cooke's wish to import duplicative network programs into the Juneau market may be perceived by Cooke as being beneficial to it, but it has not been demonstrated to be of sufficient benefit to the public to justify the requested waiver.

7. In view of the foregoing, we find that grant of Cooke's petition is not in public interest.

8. Accordingly, IT IS ORDERED, pursuant to §0.283 of the Commission's Rules, That the "Petition for Special Relief" (CSR-3407), filed May 25, 1990, by Cooke Cablevision, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] In addition, Cooke also carries the following broadcast stations: KTOO-TV (Educ., Channel 3), Juneau, Alaska; WTBS (Ind., Channel 17), Atlanta, Georgia; WGN-TV (Ind., Channel 9), Chicago, Illinois; WWOR-TV (Ind., Channel 9), Secaucus, New Jersey; and WJBK-TV (CBS, Channel 2), Detroit, Michigan.

[2] In support of this assertion, Cooke submits a letter from a subscriber, Mr. Stan Hungerford, who complains both about the quality of KJUD's picture as well as about its time-delayed carriage of network programs.

[3] The dates specified by KJUD were May 23, 1990, when it says that Cooke deleted neither the Barbara Walters Special nor the final episode of the mini-series "Twin Peaks," and May 26, 1990, when Cooke did not blackout a network episode of "Mission Impossible."

[4] To support this contention, Cooke submits an affidavit from the cable system's General Manager, Bob Pearson.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MESSAGE CENTER INC. File No. 20561-CD-P/ML-01-90

For authority to construct an additional facility to operate on frequency 454.450 MHz in the Public Land Mobile Service at St. George, Vermont for station KLF487

MEMORANDUM OPINION AND ORDER

Adopted: December 17, 1990; Released: December 20, 1990

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. On November 1, 1989, Message Center Incorporated (Message), filed the captioned application requesting authority to construct an additional facility for Station KLF487 to operate on frequency 454.450 MHz in St. George, Vermont. On September 7, 1990, Arch Connecticut Valley, Incorporated (Arch) filed an objection. For the reasons set forth herein, we dismiss Message's application.

II. BACKGROUND

2. Message is licensed to operate station KLF487 on frequency 152.15 MHz at Burlington, Vermont, and on frequency 454.175 MHz in St. George Vermont. Prior to completing construction of the St. George facility on frequency 454.175 MHz, Message filed the captioned application for an additional facility on frequency 454.450 MHz to operate under its call sign KLF487. Two weeks after Message's captioned application appeared on Public Notice, Arch filed applications proposing service on frequency 454.450 MHz at Burlington and Johnson, Vermont (File Nos. 21298-CD-P/ML-01-90 and 21360-CD-P/ML-01-90). By Public Notice of May 2, 1990, the Commission listed the two applications filed by Arch and Message's St. George application for frequency 454.450 MHz as being mutually exclusive. Subsequently, in a lottery held on September 12, 1990, Message's St. George application was selected first. While Message's captioned 454.450 MHz application was pending before the Commission, Message completed the construction of the St. George, 454.175 MHz facility and filed its FCC Form 489.

III. CONTENTIONS OF THE PARTIES

3. In its petition, Arch challenges Message's request for a third additional frequency on station KLF487 on the following substantive grounds. First, Arch argues that the grant of an additional channel to Message is unwarranted because Message has failed to comply with the traffic loading requirements of Sections 22.16(c) and 22.516 of the Commission's rules.[1] Citing *National Page Inc.*, 60 Rad. Reg. 2d (P&F) 1472 (1986), Arch states that "[o]nce a construction permit has been granted for an initial channel, on a new station an applicant for an additional channel must comply with Section 22.16." Arch contends that Message did not demonstrate a need for a third channel in compliance with Section 22.16 of the rules because it failed to amend the referenced application to provide a revised traffic loading study that takes into account the constructed St. George 454.175 MHz facility. Arch argues that Message's failure to amend the traffic load study in its St. George 454.450 MHz Application after it filed FCC Form 489 licensing the 454.175 MHz facility on station KLF487 violated the general reporting duty of Section 1.65 of the rules.[2] According to Arch, Message was required to amend its application to provide a load study for the newly licensed 454.450 MHz facility because the initiation of service on the newly licensed 454.175 MHz facility changed the overall level of loading on the system.

4. Furthermore, Arch argues that grant of a third channel is unjustified because Message appears to be warehousing frequencies. It notes that Message has not used the St. George 454.175 MHz facility and has not provided an explanation as to why the facility is not operational. Arch points out that Message, in its application for the 454.175 MHz facility, relied on the loading on its 152.15 MHz channel to justify the grant of an additional channel. Arch also points out that Message, in its application for the 454.450 MHz facility, states that the loading on its 152.15 MHz channel in October of 1989 justifies the 454.175 MHz channel and the subject 454.450 MHz channel. Arch asserts that Message's request for additional channels is based solely on the loading of the 152.15 MHz channel. In conclusion, Arch urges the Commission to dismiss Message's application.

5. In opposition, Message argues that it is unnecessary to amend its traffic loading study for its St. George 454.450 MHz application because its application complied with the Commission's rules at the time of filing. It also argues that the filing of FCC Form 489 for its St. George 454.175 MHz facility did not affect Message's need to file traffic loading studies for additional facilities. Message avers that Arch cites no Commission rule or case which holds that a traffic load study that is valid at the time of filing can subsequently be deemed invalid. Message asserts that *National Page*, which found that the applicant failed to demonstrate sufficient loading as required by Section 22.16, is inapposite because, unlike the applicant in *National Page*, it provided a sufficient traffic load study for the Burlington 152.15 MHz, facility which justified the need for additional channels. Message claims that Section 22.16 of the rules permits an applicant to file for as many as four channels at once. Message concludes, therefore, that its traffic loading is sufficient under the rules. For the foregoing reasons, Message requests that Arch's petition be dismissed and that its application be granted.

IV. DISCUSSION

6. To justify a grant of an additional channel for its existing two-way system a licensee must comply with Sections 22.16 and 22.516 of the rules. Section 22.16(a)(1) states that "applications for additional channels on an existing two-way system . . . . will be granted if the application shows that the existing system's present grade of service is 0.25 or greater . . . ." Section 22.516 provides that an applicant seeking an additional channel is required to submit a traffic load study for the existing channels.

7. Although Message had shown a grade of service of .85 based on the traffic of the 152.15 MHz facility, and therefore qualified for more than one additional channel, it did not submit traffic loading for its 454.175 MHz facility in support of its 454.450 MHz application. At the time Message filed the captioned application it had been licensed to operate in the Burlington area on frequency 152.15 MHz and it had been granted authority to construct in the St. George area on frequency 454.175 MHz. While the captioned application was pending before the Commission, Message completed construction of the St. George, 454.175 MHz facility. Therefore, at a minimum, at the time the captioned application was filed Message should have requested a waiver of the requirement for, as an additional requirement, a traffic load study for its unconstructed 454.175 MHz facility, i.e. in order to qualify for grant of the new 454.450 MHz facility. As an additional requirement, after the 454.175 MHz facility was constructed Message should have submitted a traffic load study. Consequently, Message's failure to request a waiver or to submit a traffic load study of its 454.175 MHz facility with the instant application renders the application defective on its face and subject to immediate dismissal. *See RAM Broadcasting of Indiana, Inc.*, 76 FCC 2d 364 (Com. Car. Bur. 1980). While Message is correct that at the time it filed its application to request authority to operate on frequency 454.175 MHz it submitted a traffic loading study for its Burlington 152.15 MHz facility which justified two additional channels, it requested only one channel. Therefore, when it subsequently filed the captioned application requesting to operate on frequency 454.450 MHz, it was required to submit updated traffic loading studies for all its existing channels justifying the need for an additional channel. *See Tel-E-Page*, 52 Rad. Reg. 2d 1428 (Com. Car. Bur. 1983).

8. Moreover, Message's failure to amend its application to reflect that its 454.175 MHz facility had been constructed violates the general reporting standard of Section 1.65. While Message updated its loading study for frequency 152.15 MHz, it did not provide the loading study on 454.175 MHz as required. Section 1.65 requires applicants to amend their applications within 30 days to reflect a "substantial change . . . of decisional significance . . . ." The provision of traffic loading information of frequency 454.175 MHz is of decisional significance because it is a prerequisite to obtaining additional channels. The Mobile Services Division in *Tel-E-Page, Inc., supra*, at 1429 stated that "applications must be current as required by Section 1.65 . . . If an applicant is granted additional frequencies, its . . . pending applications in the same market must be amended within 30 days . . . to provide a showing for those newly acquired facilities. . . ." For these reasons, we will dismiss Message's application to operate on frequency 454.450 MHz in St. George, Vermont.

IV. ORDERING PARAGRAPH

9. IT IS FURTHER ORDERED That the application filed by Message Center, Inc., for authority to construct an additional facility for Station KLF487 to operate on frequency 454.450 MHz in St. George, Vermont, File No. 20561-CD-P/ML-01-90, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Sections 22.16 and 22.516 of the Commission's rules provide in pertinent part that traffic load studies are required for applications which request one or more additional frequencies for an existing two-way station.

[2] Pursuant to Section 1.65 of the Commission's rules, applicants are required to amend their application within 30 days to reflect a substantial change as to any . . . matter which may be of decisional significance . . . ."

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

OMEGA CELLULAR PARTNERS File No. 10345-CL-P-674-A-88

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A
in Market 674 A, Utah 2 - Morgan

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1990; Released: December 20, 1990

By the Chief, Mobile Services Division:

1. Before us is a Petition to Deny the captioned application of Omega Cellular Partners (Omega), filed by JAJ Cellular Partnership (JAJ). A responsive pleading has been filed. JAJ, by affidavit of its General Partner, Mr. Jerome Bauman, argues that Omega's application is defective because it failed to comply with Section 22.922 of the Commission's Rules and because its financial commitment letter violates Commission policy. For the reasons stated below we are granting Omega's application.

I. PARTIES' CONTENTIONS

2. *Ownership interests*. JAJ contends that the constituent partners of Omega did not finalize their respective ownership interests in the partnership until sometime after the partnership filed its application, in violation of Section 22.922 of the Rules.[1] Its basis for this argument is that neither the partnership agreement nor the original application specified the partnership interests and therefore "the conclusion that the partners' exact ownership interests were not determined until *after* the Utah 2 application was filed. . . is inescapable." Petition at 5.[2]

3. In opposition, Omega argues that JAJ has not offered any proof of its allegation. Omega summitted each of the purchase agreements signed by its constituent partners which established each partner's share and predated the filing of the application. In addition, Omega supplied the missing Exhibit A (Service Agreement), dated July 7, 1988, which shows the total partnership interests allocated in the same amounts as they ultimately appeared in the application.

4. *Financial commitment*. JAJ's second argument is that Omega's amended financial commitment letter grants AT&T Credit Corporation (AT&T-CC) a security interest in any license awarded to Omega. JAJ argues that this arrangement violates longstanding Commission precedent, citing *Kirk Merkley*, 56 Rad. Reg. 2d (P&F) 413, 416 (1985), *Minority Ownership in Broadcasting*, 99 F.C.C.2d 1249, 1253 (1985), *Radio KDAN, Inc.*, 11 F.C.C.2d 934, 935 (1968), and *Bonanza Broadcasting Corp.*, 11 Rad. Reg. 2d (P&F) 1072, 1073 (1968). Since Omega's financial letter is not in accord with this precedent, argues JAJ, Omega has failed to prove its financial qualification and its application must be dismissed.

5. In opposition, Omega argues that JAJ's argument fails to take into account that the security interest in Omega's license was conditioned on such a security interest being permitted under the Commission's rules. Omega provides a letter from AT&T-CC clarifying the security interest requirement in its firm financial commitment letter. The letter states in part:

> AT&T-Credit realizes that at present, it is not permissible (and does not presently expect) to obtain a lien on a cellular license issued to Omega Cellular. However, in the event that such liens are permitted in the future . . . AT&T-Credit, by virtue of this letter, has notified the Customer of such a requirement.

II. DISCUSSION

6. *Ownership interests*. The first issue for our consideration is whether Omega violated Section 22.922 of the rules as JAJ charges. Such a violation would result from the sale, transfer, assignment, or other alienation of any cellular application between the time the application is filed and the time a construction permit is issued. *See generally*, *Modoc RSA Limited Partnership*, 4 FCC Rcd 3996 (1989). The documentation provided by Omega makes clear that the partnership shares in Omega were settled prior to the time the application was filed. JAJ has provided no evidence to the contrary. Accordingly, we find that there is no evidence that Omega violated §22.922 of the rules.

7. *Financial commitment*. The second issue we will consider is whether Omega has demonstrated it is financially qualified. It is well established that a license is not an asset of the licensee and does not give any property rights in the license itself, that the Commission does not recognize a security interest in a license, and that credit cannot be extended in reliance upon the license as an asset from which a licensee's obligations may be satisfied. *Kirk Merkley*, 56 Rad. Reg. 2d (P&F) at 416; *Minority Ownership in Broadcasting*, 99 F.C.C. 2d at 1253. Moreover, where a licensee has defaulted to its creditors, where it has no physical plant with which to offer service, and where it has allowed its station to remain dark, the Commission will not permit transfer of the bare license. *Radio KDAN, Inc.*, 11 F.C.C. 2d at 935; *Bonanza Broadcasting Corp.*, 11 Rad. Reg. 2d (P&F) at 1073.

8. We have reviewed Omega's financial commitment letter and the clarification supplied by AT&T-CC. It appears that AT&T-CC understands that it has no property or security interest in Omega's future license, and that any security provision in its favor in Omega's license would be unenforceable. The law at the present time allows no property interest in radio spectrum. *Compare* Section 22.917(e) (notice upon default for equipment repossession). Accordingly, AT&T-CC's conditional security interest in Omega's license is not permitted by law. However, because it specifies that the security interest is limited to that interest permitted by law, the provision is harmless and does not render Omega's financial commitment letter defective. Therefore, we find that Omega has complied with the requirements of Section 22.917 and is financially qualified.

III. CONCLUSION

9. In view of the foregoing, we find that Omega is legally, technically, financially and otherwise qualified to be a Commission licensee. Furthermore, we find that granting the pending application for Utah 2-Morgan would be in the public interest and promote the efficient provision of cellular services to the public.

IV. ORDERING PARAGRAPHS

10. Accordingly, IT IS ORDERED that the application filed by Omega Cellular Partners, File No. 10345-CL-P-674-A-88, IS GRANTED. Construction is not authorized to commence at any location for which a final Federal Aviation Administration determination has not been submitted to the Commission and any required marking and lighting specifications have not been issued by the Commission. The authorization does not include the right to any interference protection in any areas outside the Utah 2 - Morgan RSA and is conditioned upon coordinating with the current and future co-channel licensees in the areas outside the RSA. Omega is on notice that in the event current or future MSA/RSA licenses encounter interference from any subsequent service extensions, Omega will have to change frequencies in those calls or reduce 39 dBu contours to eliminate any intereference.

11. IT IS FURTHER ORDERED that the petition to deny filed by JAJ Cellular Partnership IS DENIED.

12. IT IS FURTHER ORDERED that all other non-wireline cellular applications in the Utah 2 - Morgan RSA market ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.922 states:

> Notwithstanding any other section of this Part, the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas is prohibited prior to the grant of a construction authorization. This restriction on transfers of interests in such cellular applications shall include any form of alienation, including option arrangements and agreements, as well as equity and debt placement plans.

[2] JAJ argues that the fact that Exhibit A (Service Agreement) of the Partnership Agreement was not included in the application although it was mentioned, is further proof the partnership shares had not been finalized at the time Omega's application was filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-356

In the Matter of

Amendment of the Amateur Radio Service Rules to Make the Service More Accessible to Persons with Handicaps.

REPORT AND ORDER

Adopted: December 13, 1990; Released: December 27, 1990

By the Commission:

I. INTRODUCTION

1. On August 1, 1990, we adopted a *Notice of Proposed Rule Making* (*Notice*) [1] in the above-captioned proceeding. In the *Notice*, we proposed to exempt from the higher speed Morse code telegraphy examinations amateur operator licensees who, because of severe handicaps, are incapable of passing those examinations. This *Report and Order* adopts the proposed rules with the changes discussed below.

2. Further, on September 21, 1990, the American Radio Relay League, Inc. (ARRL) requested an extension of time within which comments could be filed in this proceeding. By *Order* [2] of September 27, 1990, the Acting Chief, Private Radio Bureau, denied the request. On October 25, 1990, ARRL filed an Application for Review of that action. This *Report and Order* affirms the Bureau's action denying the requested extension.

II. BACKGROUND

3. Our *Notice* was directed toward making the amateur service more accessible to persons with severe handicaps. The major complaint we receive from severely handicapped persons is that they cannot pass a telegraphy examination. To qualify for an amateur operator license, applicants must pass telegraphy as well as written examinations administered by volunteer examiners (VEs) in the community. [3] The telegraphy examination requires examinees to prove they can send and receive texts in Morse code signals.[4]

4. The VEs require the examinee to listen to an audible Morse code message sent at the required speed, usually by a paper or magnetic tape player or personal computer, and to interpret the message correctly. The VEs allow handicapped examinees to demonstrate their knowledge of the Morse code, where necessary, by using special accommodative procedures.[5] The nature of some handicaps, however, prevent some otherwise qualified persons from passing the higher speed telegraphy examinations even when the VEs employ accommodative procedures. The *Notice*, therefore, proposed to exempt severely handicapped persons from the higher speed 13 and 20 words per minute (wpm) telegraphy examinations, if they had a certifiable disability which prevented them from passing such examinations. Inasmuch as the basic slow speed 5 wpm examination is the minimum Morse code requirement for an amateur operator license, no exemption from that requirement was proposed.[6]

III. COMMENTS

5. We received more than 100 comments and reply comments in response to the *Notice*. Many of the commenters support our objective to make suitable provisions for amateur operator license applicants with severe handicaps. Many of these commenters, however, have misgivings about the possibility of abuse by persons desiring higher operator class privileges but who simply want to avoid the effort required to develop a higher level of skill in the Morse code. The opposing comments generally were filed by individuals who object to the proposal because the proposed list of disabilities is too broad, because of a perceived nexus between a telegraphy requirement and a disciplined radio service, or because the proposal demeans the handicapped.[7] For example, Ms. April Moell opposes the proposal stating that the exemptions proposed in the *Notice* are condescending, patronizing, and paternalistic. She also states that occupational therapists and certified vocational evaluators, rather than physicians, would be better qualified to make the functional evaluations that are needed to determine the incapacitation resulting from a disability.[8]

6. Of all the proposals in the *Notice*, the proposed list of disabilities drew the most comments. Many commenters believe that the breadth of the disabilities list creates a potential for abuse. Alan L. Braun, M.D., states that the list, taken from the Rehabilitation Act of 1973, as amended,[9] relates to the employability of an individual and not to the taking of a telegraphy examination. He adds that many persons who have handicaps that prevent them from working do not have handicaps that prevent them from taking a telegraphy examination.[10] He includes an analysis of the disabilities in the list, discusses the degree of incapacitation that results from them, and how they affect an individual's ability to pass a telegraphy examination. For example, with respect to the disability of "heart disease," he states that a person who is housebound because of recurring chest pains generally has all mental and motor faculties intact and would not require an exemption, albeit that disability might warrant having the VEs administer the examination in the examinee's home.[11]

7. Other commenters agree that the disability definition is unsatisfactory and not particularly relevant in determining significant handicaps from the standpoint of copying the Morse code.[12] Glenn Johnson, M.D., contends that adults generally have some mild "arthritis" or "mental impairment" in the form of anxiety that would qualify as a disability under the proposed definition.[13] Dr. Braun also warns that a physician might readily execute the required certification of the disability because of the subtle financial pressure on the physician to provide it.[14] Michael C. Trahos, D.O., points out in his reply comments that the term "physician" denotes both osteopaths (doctors of osteopathy) and allopaths (doctors of medi-

cine). He believes that the term "physician" should include optometrists, dentists, oral and maxillofacial surgeons, podiatrists, and chiropractors.[15]

8. Many commenters want assurances that individuals who desire to take a telegraphy examination will not be barred from doing so.[16] Some commenters who support the proposal indicate that it should not apply to the 20 wpm examination.[17] Other commenters desire the establishment of panels of physicians who are also amateur operators for the purpose of reviewing exemption requests. Some commenters want only designated physicians who are also amateur operators to issue certifications.[18] Still other commenters state that most physicians lack an understanding of the amateur service and the Morse code and, therefore, are not qualified to judge whether a particular individual should be exempt from the telegraphy examination.[19] Despite the changes that they suggest, these commenters by and large favor the Commission's efforts to assist the handicapped. Ray Adams asks whether the volunteer-examiner coordinators (VECs) can accredit as administering VEs severely handicapped Advanced or Amateur Extra Class operators who obtained their licenses without passing the required telegraphy examinations themselves.[20]

9. The ARRL believes that only the special accommodative procedures and case-by-case waivers are necessary. It requests that the proceeding be terminated without action.[21] Specifically, ARRL argues that the exemption proposal in the *Notice* is inadequate to protect the integrity of the examination system. It contends that the certification statements obtained from physicians could be forgeries, or could be executed by physicians who do not appreciate their importance or purpose. Because of the confidentiality of the doctor-patient relationship, moreover, it will be virtually impossible to verify the authenticity of any given physician's certification.[22]

10. The ARRL also notes that a physician is not necessarily equipped with the skills to determine a severely handicapped person's inability to pass a Morse code examination administered using special accommodative procedures. It states that the proposed certifications to support exemption from the telegraphy examination should be provided by experts in learning disabilities or rehabilitative medicine, not physicians in general.[23] The ARRL suggests that a narrow set of disability criteria be developed with the help of experts. It recommends that applications for exemption from the higher speed telegraphy examinations be submitted directly to the Commission and not through VEs.[24] In addition, ARRL would have the Commission establish a panel of experts to provide us with guidance on specific exemption applications.[25] Finally, the ARRL discusses the necessity of obtaining a release from the handicapped person granting permission for disclosure to the Commission of medical information.[26]

11. Mr. Bruce L. Humphrys also opposes the Commission's proposal.[27] He states that all examinees, including all handicapped examinees, must be sent the same examination messages.[28] The handicapped examinee's test, however, would be graded on a sliding scale based upon the examinee's level of functional disability tied directly to a diagnosis as defined by the International Code of Diagnoses (ICD-9). Each handicapped examinee's disability as measured against the ICD-9 codes would determine the number of correct answers that the examinee needed to pass the examination.[29]

IV. DISCUSSION

12. It is clear from the comments that the *Notice* addressed a problem not previously dealt with adequately in the amateur service. After careful consideration of all comments and reply comments, we will adopt with certain modifications our proposal to exempt from the higher speed telegraphy examinations persons who, because of severe handicaps, are incapable of passing those examinations. For persons who do not know the Morse code, whether handicapped or not, the *Report and Order* in PR Docket No. 90-55, also adopted today, removes the telegraphy requirement from the Technician Class operator license. To upgrade to a higher class license, that is, General, Advanced, or Amateur Extra Class license, or to obtain high frequency Novice Class privileges, however, Morse code proficiency must be demonstrated in accordance with the international Radio Regulations No. 2735 (Geneva, 1979).

13. A prevalent misconception in the comments is that all severely handicapped individuals will be required to apply for exemption from the telegraphy examinations and will be denied the opportunity to take the higher speed examinations. We emphasize that the VEs must not turn away any applicant who wants to take the telegraphy examinations. We believe that this policy responds to critics who state that severely handicapped persons are insulted by the proposed exemption procedures. We are very supportive of the desire of any handicapped person who seeks the challenge of the telegraphy examination.

14. Implementing the examination procedure proposed by Mr. Humphrys would burden the administering VEs with the many details that would be involved in correlating diagnoses with functional disabilities and in grading the examinations. The VEs and the VECs are volunteers and we will not impose such complex additional administrative procedures on them.

15. We have considered the recommendations by the commenters for the establishment of medical panels that would establish disability criteria. We have also considered the request for review boards that would advise the Commission as experts in specific exemption cases. Whether it be a panel or a board, we do not want to create additional layers of reviewers for the amateur service. There inevitably would be issues concerning (a) composition of and eligibility for membership on the panel/board, (b) compensation, and (c) liability. We have neither the staff nor the resources to administer such panels/boards. As we indicated in the *Notice*, for administrative purposes only, the exemption provision will be incorporated into the existing VEC system. Administering VEs will be required to give examination credit to examinees who present the specified documentation, including the necessary physician's certification that because the examinee is a person with a severe handicap he or she is unable to pass the higher speed telegraphy examinations.

16. The ARRL's argument that the integrity of the examination process will be jeopardized by the granting of telegraphy examination credit by the VEs,[30] conflicts with its position on the granting of waivers of the telegraphy requirement by the Commission. In either case, it is the judgment by a physician of the severely handicapped person's inability to pass the examination that determines whether the person is excused from the requirement. Our action in this proceeding clarifies the basic criteria for exemption by spelling out what we expect from the col-

laborative actions of the physician and the patient-examinee. Moreover, the administering VEs who are currently handling the administrative details of requests for waiver of the higher speed telegraphy examinations will not have to assume any additional burdens when they give examination credit to such examinees in response to exemption requests.

Definition of Disabilities

17. Based on the comments, we will not adopt the proposed list of disabilities. Instead, we will rely on the integrity and the judgment of the physician who signs the certification to establish, after consulting with the patient, that the person is severely handicapped and because of the disability is unable to pass the telegraphy examination. We expect both the examinee and the physician to be honest, with the examinee describing to the physician the nature of a telegraphy examination and the difficulties that the severe handicap presents. We will also develop a briefing paper for physicians that describes the nature of the Morse code examinations. Based upon the exchange between the physician and the examinee, we expect the physician to execute the certification only in worthy cases.

Physician's Certification / Medical Information Release

18. We intend to incorporate the physician's certification into the amateur service license application form (Form 610), where it will contain a warning regarding the penalties for making willful false statements to the Commission in violation of 18 U.S.C. § 1001. We also adopt herein ARRL's suggestion to include a provision for release of medical information by the examinee. The release will be a signed statement by the examinee giving permission for the disclosure of medical information to the Commission relating to the severe handicap. The release will also be incorporated into the Form 610. Section 97.505 of the Commission's Rules, 47 C.F.R. § 97.505, is amended to include the requirement of the physician's certification and the examinee's release.

Definition of Physician

19. With respect to including other practioners within the meaning of the term "physician," we recognize that the term may be defined differently depending upon the context. For this proceeding, we consulted the American Medical Association (AMA). The AMA defines the term "physician" to be a practitioner with full medical privileges, that is, either a doctor of osteopathy or a doctor of medicine. We adhere to the AMA definition in the rules adopted. Insofar as accepting certifications from rehabilitative specialists, occupational therapists, and vocational evaluators, as suggested by some commenters, we are not inclined to do so. As stated above, we want the judgment of a physician as to the examinee's overall condition to be the final word with respect to the examinee's inability to take the higher speed telegraphy examination.

Special Accommodative Procedures

20. The commenters generally support the special accommodative procedures that the VEs use to administer telegraphy examinations to handicapped persons. Some state, however, that these accommodations should provide handicapped persons only with an opportunity to demonstrate that they know the Morse code.[31] International Radio Regulation No. 2735 (Geneva, 1979), which requires that the examinees prove that they can send and receive the Morse code on frequencies below 30 MHz, is silent on sending speed and on accommodations for handicapped persons. The special accommodative procedures, however, will usually show that the examinees know the Morse code, albeit at slower speeds. For instance, where the examinee's particular handicap precludes a receiving test, the VEs substitute a sending test. Although an examinee's sending ability usually exceeds the receiving ability, passing a sending test is still proof that the examinee knows the Morse code. The criterion the VEs should employ when using the special accommodative procedures is whether the examinee knows the forty-three telegraphy characters specified in Section 97.507(e) of the Commission's Rules, 47 C.F.R. § 97.507(e).

Handicapped VEs

21. An issue raised in the comments is whether VEs should administer examinations that they have not passed themselves. For the purpose of administering an examination for an amateur operator license, Section 4(f)(4)(B) of the Communications Act of 1934, 47 U.S.C. § 154(f)(4)(B), authorizes the Commission to accept and employ the voluntary and uncompensated services of any individual who holds an amateur operator license of a higher class than the class license for which the examination is being administered.[32] The VECs, therefore, can accredit handicapped licensees as administering VEs. Section 97.525(a)(3) of the Commission's Rules, 47 C.F.R. § 97.525(a)(3), however, prohibits a VEC from accrediting a person as a VE if the VEC determines that the person is not competent to perform the VE functions. A VE who does not have the skill to receive Morse code messages sent at 20 wpm, for instance, is not competent to administer a 20 wpm sending test because the VE cannot receive the message sent by the examinee. That same VE, however, might be competent to administer a 20 wpm receiving test where the message is sent by a tape player and the content of the message is known by the VE. Any VE who is not competent to perform the VE functions required for any particular examination should not administer that examination.

V. APPLICATION FOR REVIEW OF ORDER DENYING EXTENSION OF COMMENT PERIOD

22. The ARRL requested an extension of time[33] for filing comments in this proceeding so that it could receive and study data from its membership. Also, according to ARRL, there is no urgent reason for concluding this proceeding because waivers of the higher speed telegraphy requirement are currently being granted on an interim basis. The Acting Chief, Private Radio Bureau, denied the request and pointed out that it is important for the severely handicapped to know as soon as possible whether there will be greater accessibility to the higher grade amateur operator licenses. In its Application for Review, ARRL reiterates the same arguments and requests an extension of time for forty-eight additional days in which comments may be filed.

23. The *Notice* in this proceeding clearly stated that extensions of time for filing comments were not contemplated. The Commission has been operating under temporary procedures in handling waiver requests from handicapped individuals since July, 1990. The comment

and reply comment periods (five and one-half weeks and two weeks, respectively) provided ample time for response. Indeed, we received submissions from more than one hundred respondents, including VECs and VEs. Thus, we believe we have a good cross section of views from persons who actually are involved in administering examinations. In addition, we are now processing approximately one hundred waiver requests per month under the temporary procedures. We need to establish expeditiously definite standards in the rules for handling exemptions for the severely handicapped. A rule provision for these cases will not only be advantageous to severely handicapped individuals, but will also be more cost efficient for the Commission to administer. For these reasons, the *Order* denying the requested extension of time for the filing of comments will be affirmed.

VI. CONCLUSION

24. In summary, we have decided to make the amateur service more accessible to amateur operator licensees who, because of severe handicaps, are incapable of passing the higher speed telegraphy examinations. We, therefore, generally adopt the rules that we proposed. We have, however, not included any reference to a list of disabilities. In addition, we intend to modify the the Form 610 to include the physician's certification and the examinee's release.

VII. PAPERWORK REDUCTION ACT

25. The action taken herein has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520, and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VIII. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that effective **February 14, 1991,** Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth below. Authority for this action is found in Sections 4(i) and 303(l)(1) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (303)(l)(1) and (r).

27. IT IS FURTHER ORDERED that the *Order* of September 27, 1990, denying an extension of time for filing comments in this proceeding, IS HEREBY AFFIRMED and ARRL's Application for Review IS HEREBY DENIED.

28. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMNUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064 - 1068, 1081 - 1105, as amended; 47 U.S.C. §§ 151 - 155, 301 - 609, unless otherwise noted.

2. Section 97.3 is amended by redesignating paragraphs (a)(29) through (a)(40) as (a)(30) through (a)(41) and adding a new paragraph (a)(29) to read as follows:

§ 97.3 Definitions.

(a) * * *

(29) *Physician.* For the purposes of this Part, a person who is licensed to practice in a place where the amateur service is regulated by the FCC, as either a Doctor of Medicine (M.D.) or a Doctor of Osteopathy (D.O.).

* * * * *

3. Section 97.505 is amended by adding paragraph (a)(5) to read as follows:

§ 97.505 Element credit.

(a) * * *

(5) A current, or expired but within the grace period for renewal, Novice, Technician plus a CSCE indicating that the person passed element 1(A) or 1(B), Technician issued before February 14, 1991, General, or Advanced Class operator license, and a Form 610 containing:

(i) A physician's certification stating that because the person is an individual with a severe handicap, the person is unable to pass a 13 or 20 words per minute telegraphy examination; and

(ii) A release signed by the person permitting disclosure to the FCC of medical information pertaining to the person's handicap: Element 1(C).

* * * * *

4. Section 97.511 is amended by revising paragraph (f) to read as follows:

§ 97.511 Technician, General, Advanced and Amateur Extra Class operator license examination.

* * * * *

(f) Within 10 days of the administration of a successful examination for the Technician, General, Advanced or Amateur Extra Class operator license, the administering VEs must submit the application to the coordinating

VEC. If telegraphy element credit is claimed under Section 97.505(a)(5), the physician's certification and the patient's release on the license application, Form 610, must be completed.

FOOTNOTES

[1] 5 FCC Rcd 4889 (1990); 55 Fed. Reg. 33335, August 15, 1990.

[2] 5 FCC Rcd 5773 (1990).

[3] The required telegraphy speed for the Novice and Technician Classes of operator license is 5 wpm. For the General and Advanced Classes, it is 13 wpm. For the Amateur Extra Class, it is 20 wpm. *See* Sections 97.501 and 97.503 of the Commission's Rules, 47 C.F.R. §§ 97.501 and 97.503.

[4] Section 97.509(d) of the Commission's Rules, 47 C.F.R. § 97.509(d), provides that "Passing a telegraphy receiving examination is adequate proof of an examinee's ability to both send and receive telegraphy." In a *Report and Order* in PR Docket No. 90-55, also adopted today, the Commission removes the telegraphy requirement from the Technician Class license.

[5] *See* Section 97.509(h) of the Commission's Rules, 47 C.F.R. § 97.509(h). The special accommodative procedures include, as warranted, suitable pauses in sending the message after each sentence, each phrase, each word, or each character to allow the examinee additional time to absorb and interpret what was sent. Where warranted, a sending test is substituted for a receiving test. *See also* para. 20, infra.

[6] The international Radio Regulations No. 2735 (Geneva, 1979) require that all persons seeking a license to operate an amateur station transmitting below 30 MHz prove that they are able to send correctly by hand and receive correctly by ear texts in Morse code signals.

[7] *See* comments of Mark Murphrey at 1, Jack Williamson at 1, Marcus L. Vucinovich, Jr. at 1, Charles Lewis at 1, Barney Bates at 1, David Heller at 4, Douglas Dein at 1, and April Moell at 3-4.

[8] Comments of April Moell at 3-4.

[9] 29 U.S.C. §§ 701-796 (1973).

[10] Comments of Alan L. Braun, M.D., at 3.

[11] Appendix to comments of Alan L. Braun, M.D., at 1-8.

[12] *See* comments of Peter J. Milano at 1, George W. Mann III at 1, and Eric Koch at 3.

[13] Comments of Glenn R. Johnson, M.D., at 1.

[14] Comments of Alan L. Braun, M.D., at 5-6.

[15] Reply comments of Michael C. Trahos, D.O., at 5-6.

[16] *See* comments of Ralph Andrea at 1, David L. Justis, M.D., at 2, and Bob Nygren at 2-3.

[17] *See* comments of Gordon Girton at 1, Terry Sanner at 1, and Glenn Johnson, M.D., at 2. See also comments of Steve Lund at 2. Mr. Lund opposes the proposal and particularly the 20 wpm exemption, pointing out that if a licensee cannot copy Morse code at 20 wpm, communications with other amateur operators in the Amateur Extra subbands will not be possible.

[18] Comments of Henry C. Heimansohn, D.D.S., at 2, Glenn Johnson, M.D., at 2, Jacquelyn van de Kamp at 1, and W. van de Kamp at 1.

[19] Comments of Robert W. Owens at 1, Saint Mary Amateur Radio Club at 1, Frederick Maia at 16, and Eric Koch at 3.

[20] Comments of Ray Adams at 1.

[21] Comments of ARRL at 18 and 19.

[22] Comments of ARRL at 11.

[23] Comments of ARRL at 12.

[24] Comments of ARRL at 14-15.

[25] Comments of ARRL at 15.

[26] Comments of ARRL at 15 and 16.

[27] Comments of Bruce Humphrys at 4. Mr. Humphrys is the Director of the Courage HANDI-HAM System, an international non-profit organization whose mission is to assist persons with disabilities in their pursuit of amateur radio licensing and experience.

[28] Comments of Bruce Humphrys at 8.

[29] Comments of Bruce Humphrys at 10.

[30] Comments of ARRL at 11 and its reply comments at 3.

[31] *See* comments of Robert N. Nygren, Jr. at 2-3, David L. Justis, M.D., at 2 and 4, and April Moell at 2-3.

[32] Examinations for the highest class of operator license, the Amateur Extra Class, may only be administered by VEs holding Amateur Extra Class licenses.

[33] The ARRL's request for extension of time was procedurally defective. It was filed three days before the comment period closed. Section 1.46(b) of the Commission's Rules, 47 C.F.R. § 1.46(b), requires that such a request be filed seven days before the comment period closes.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-55

In the Matter of

Amendment of Part 97 of the	RM-6984 RM-6985
Commission's Rules Concerning	RM-6986 RM-6987
the Establishment of a	RM-6988 RM-6989
Codeless Class of Amateur	RM-6990 RM-6991
Operator License.	RM-6992 RM-6993
	RM-6994 RM-6995

REPORT AND ORDER

Adopted: December 13, 1990; Released: December 27, 1990

By the Commission:

I. INTRODUCTION

1. On February 8, 1990, we adopted a *Notice of Proposed Rule Making* (*Notice*) [1] in the above-captioned proceeding. In the *Notice*, we proposed to establish a new class of amateur operator license (codeless class) that would not require applicants to prove that they can send and receive texts in Morse code telegraphy signals.[2]

2. In response to the *Notice*, we received over 1,100 comments and 12 reply comments from individuals and organizations. The comments are generally supportive of an entry level codeless class. They differ widely, however, in support for the proposed license requirements, operator privileges, and license class structure. This *Report and Order* adopts the rules for a new codeless class license as proposed in the *Notice* with the changes discussed below.

II. BACKGROUND

3. The international Radio Regulations require that persons seeking a license to operate an amateur station prove that they have the ability to send correctly by hand and to receive correctly by ear text in Morse code telegraphy signals. [3] Although this requirement may be waived for an operator of a station transmitting exclusively on frequencies above 30 MHz,[4] each of the five classes of operator licenses currently issued by the Commission requires the applicant to pass an examination in the international Morse code.[5]

4. Over the years, we have received many requests from persons who argue that proficiency in telegraphy is an unreasonable barrier to obtaining an amateur operator license. When we proposed codeless classes previously,[6] nevertheless, the amateur community strongly objected. Lately, however, the sentiment of the amateur community appears to favor at least an entry level codeless class. As a result, our *Notice* proposed to reprogram resources from processing applications for new Novice and Technician Class licenses to processing applications for licenses for a new entry level codeless class.

5. In the *Notice*, we stated the three fundamental objectives that we have with respect to the proposed codeless class. Our first objective is to offer an entry level operator license opportunity to otherwise qualified persons who find the telegraphy requirement a barrier to pursuing the purpose of the amateur service.[7] Our second objective is to establish a type of license that can be implemented promptly. Our third objective is to avoid negative effects upon current licensees, upon the work of the volunteer examiners (VEs), or upon the Commission's workload and resources.

6. In the *Notice*, we proposed to add a new entry level codeless "Communicator Class" operator license in lieu of the existing Novice and Technician Classes of licenses. We also proposed to grandfather current Novice and Technician Class operator licenses indefinitely. The operator privileges proposed included all authorized emission types, a maximum transmitter power of 200 watts peak envelope power, and authorization to transmit on amateur service frequency bands above 30 MHz with the exception of the 2 meter and 6 meter bands.

III. DISCUSSION

7. Approximately seventy percent of the comments to this proceeding favor at least an entry level codeless license. Some of these comments, however, advance proposals that go beyond establishing a single codeless class.[8] Other supporting comments suggest alternatives that would have undesirable effects upon present licensees.[9] Still other supporting comments suggest alternatives that would have unacceptable effects upon the VEs and the Commission's workloads.[10] The remaining thirty percent of the comments object to any form of codeless license.[11] In the paragraphs below, we address in detail the issues raised in the *Notice* and comments.

A. Need for codeless class

8. *Proposal.* Our *Notice* was issued in response to twelve petitions for rule making calling for codeless license classes. We observed that a significant segment of the amateur community appeared to have a new view of the role of telegraphy in the future of the amateur service.[12] We also stated that this was a propitious time to propose the establishment of an entry level codeless class, given the advances in electronic communications in the past few years.[13]

9. *Comments.* Among those affirming the need for a codeless class is the Quarter Century Wireless Association (QCWA) whose comments state that "[m]any QCWA members have a lifetime history of operating with, and a sentimental attachment to, use of the Morse code. It is understandable that some may not be overly enthusiastic in endorsing changes in licensing procedures which would delete the requirement of proficiency in this traditional mode of communication. Nonetheless, after consideration of the facts associated with licensing trends, we have concluded that the blanket code proficiency requirement may be a major cause of decline in the entry of many people into the Amateur Radio Service. Given this conclusion and in recognition of our responsibility to the

Public Interest, we are agreed that a blanket Morse code requirement for entry into the Amateur Radio Service can no longer be justified."[14]

10. The American Radio Relay League, Inc. (ARRL) states that our objectives in this proceeding are basically sound and are consistent with its own rationale for the creation of a codeless class.[15] An ARRL study committee has concluded that the perception of the Morse telegraphy requirement filtered out too many desirable and technically qualified operators who have not recognized the value of manual telegraphy as a means of practical communication.[16]

11. The National Conference of Volunteer Examiner Coordinators (NCVEC) states that it found ample evidence that the Morse telegraphy requirement is no longer essential to an entry level amateur operator license.[17] The Amateur Radio Industry Group (ARIG), another codeless class supporter, states that "[a]mateur radio has evolved from a hobby of tinkerers and telegraphers into a service of communicators. . . . [T]he Morse code requirement at the entry level is a carryover from the origins of amateur radio which today may be preventing many interested and otherwise qualified persons from entering the Amateur Radio Service."[18]

12. The opposing comments hold that telegraphy skill is absolutely required for any participation in the amateur service. Their arguments are generally based upon claims for telegraphy as a superior communications medium and for telegraphers as model radio operators. Representative comments are as follows. "Morse code is the most effective means of communicating and the only one which can be used under the most adverse conditions."[19] "All hams must be prepared to use code in an emergency situation."[20] "We do not desire to have individuals join our ranks that would have us lower our standards."[21] Another argument is based upon the need to maintain tradition. "I had to take the code when I got my ticket, so why should someone else pass the code up?"[22] "I believe everyone should be blessed with the glory of learning code before operating in the amateur frequency spectrum."[23]

13. *Discussion*. The comments clearly confirm that the amateur community is undergoing a dramatic shift in sentiment concerning the value of Morse code as an entry level license requirement. For the amateur service to achieve its purpose it must have the participation of as many qualified persons as possible who desire to pursue that purpose. Modern commercial and military electronic systems require engineers to design them, technicians to install and maintain them, and a technologically literate citizenry that can use them. The amateur service should, as it has in the past, attract technically inclined persons, particularly the youth of our country, and encourage them to learn and to prepare themselves in the areas where the United States needs expertise. We do not foresee that telegraphers will be in as great demand by future systems as will electronics and communications experts.

14. Telegraphy skill has been required for each person who has ever been issued an amateur operator license in the United States, including the current 493,000 licensees. Mastering the Morse code was an arduous task for many of these licensees, and by developing their telegraphy skills they expressed their intense desire to become amateur operators. It is understandable, therefore, that there are licensees who are reluctant to share the amateur service frequencies with new licensees who have not made a similar effort to master the Morse code. We conclude, however, that telegraphy skill is not so essential to proper operation of a station that transmits exclusively above 30 MHz such as to justify turning away otherwise qualified persons who do not possess the skill. The *Notice*, furthermore, did not propose to delete the telegraphy skill requirement for a licensee to be the control operator of a station transmitting below 30 MHz where telegraphy communications take place extensively and worldwide communications are possible. The sharing of frequencies between codeless class licensees and other licensees can take place on frequency bands above 30 MHz where telegraphy operation is minimal and where the transmission of the more modern emission types such as data, image, phone, pulse, RTTY, and spread spectrum, predominate.[24]

15. We do not concur with the comments alleging that the passing of a telegraphy examination is an indication of the examinee's good character, high intelligence, cooperative demeanor, or willingness to comply with our rules.[25] These traits are also found in individuals who have not passed a telegraphy examination rather than being exclusive to those who have passed such a test. For regulatory purposes, passing a telegraphy examination is no more and no less than proof of the examinee's ability to send and receive texts in Morse code at some specified rate. With respect to comments that make claims for the superiority of telegraphy over other types of communications, we do not consider these arguments as germane to this proceeding. The *Notice* did not propose to discontinue the authorization of telegraphy CW emission types on any amateur service frequency. The amateur service in the future, as it has in the past, can provide to those who personally desire to do so the opportunity to communicate by telegraphy.

16. We are adopting rules, therefore, that implement the codeless license option provided in the international Radio Regulations. These new rules offer a codeless class of license that authorizes control operator privileges at stations which transmit exclusively above 30 MHz. This satisfies our objective of providing an entry level opportunity to otherwise qualified persons who find telegraphy a barrier to pursuing the purposes of the amateur service.

B. Operator License structure

17. *Proposal*. Our *Notice* proposed to add a new codeless class in a simplified license structure containing four ascending steps: new codeless Communicator, General, Advanced, and Amateur Extra Classes. There would also be, in effect, a "Communicator Plus CSCE"[26] operator class which recognized that some Communicator Class licensees hold a CSCE showing the licensee has passed an international Morse code test but which would not require additional license processing resources. The codeless class would be the first step in the license structure instead of the Novice Class. We stated that this structure could be rapidly implemented because the present license processing system and application form would continue to be used. Our *Notice*, however, particularly asked the amateur community to consider carefully the alternative of preserving the existing five-step ladder by simply eliminating the telegraphy examination requirement from the Novice Class license.

18. *Comments*. In general, the comments object to the proposal to discontinue issuing new Novice and Technician Class licenses. The NCVEC, in particular, stresses that the volunteer-examiner coordinators (VECs) desire

that the existing license structure should be preserved to the maximum extent possible. It proposes the addition of a sixth class of license, although "[t]he VECs recognize that [this] position is not resource neutral . . . . This does not mean, however, the VECs would be any less in favor of a codeless license if the Communicator Class could only be implemented in place of one or more other classes."[27]

19. The QCWA states that another operator license class is unnecessary. It contends that the codeless class can be best implemented by simply removing the telegraphy requirement from the Technician Class operator license and modifying its privileges to comply with the international Radio Regulations.[28] The ARRL maintains, however, that there should be two paths of initial entry into the amateur service, (a) the current code-required Novice Class and (b) a new codeless class. The ARRL acknowledges, however, that the resulting "six classes of amateur license are, for the long term, perhaps an overly complex scheme, (but) the matter can be revisited in the future, after the Amateur Radio Service has had some experience with, and becomes adjusted to, the now new concept of a codeless license class."[29]

20. Our inquiry concerning the desirability of conversion of the Novice Class into a codeless class was not supported generally. The ARRL states that a codeless class would not be a suitable substitute for the Novice Class as an entry level license. It adds that closing off the telegraphy "route of entry for the Service would in fact stifle a large percentage of the newcomers to the Service."[30] The NCVEC reports that a survey of VEs shows that "[m]any newcomers would still prefer to obtain a Novice Class license, which is also the least expensive path into amateur radio."[31] The QCWA "also urges that the Novice Class license . . . be continued . . . [as] a route for the person who finds little difficulty with a Morse code requirement but lacks the extensive skills and technical knowledge required by the Technician Class examination."[32]

21. *Discussion*. The addition of a sixth class of license to an already intricate license structure is neither desirable nor achievable without unacceptable effects upon our workload. Even if there were no increase in the number of new licensees, adding a sixth license class would result in an increased demand for license application processing: most newcomers to the amateur service initially obtain the lowest class of license and those who subsequently advance to the higher license classes usually do so one class at a time.

22. The disadvantages of a sixth license class are further compounded by the nature of our computer-aided application processing system. On further investigation, we have determined that our present computer system will not support six classes of licenses without new and significant expenditures of resources. The additional work to modify the system to have the capability of supporting the processing for a sixth class of license is inconsistent with our objective of limiting impact on our workload and resources. A new Communicator Class of license, consequently, is not a viable solution. The codeless class, therefore, must be incorporated into the present license structure.

23. Because it requires the least difficult written examination, the option of converting the Novice Class to a codeless class is not a solution generally supported by the commenters. The Novice Class, moreover, has very limited privileges above 30 MHz.[33] The Technician Class, however, has a more difficult written examination and authorizes all privileges above 30 MHz. The conversion of the Technician Class to a codeless class, as allowed by the international Radio Regulations and as recommended by QCWA and other commenters,[34] therefore, is the logical choice. Approximately ten percent of new licensees already enter the service at the Technician Class level.[35] The 126,543 current Technician Class licensees, however, are also authorized the same limited privileges as Novice Class operators below 30 MHz on the basis of having passed a telegraphy examination. To achieve our goal of avoiding any negative effects upon current licensees, therefore, we can make provisions in the rules for these licensees to retain all of their current privileges.[36]

24. We are, accordingly, establishing the Technician Class as the codeless class of license that includes all amateur privileges above 30 MHz. We are amending Section 97.301(e), however, to grandfather frequency privileges below 30 MHz to current Technician Class licensees as well as to authorize these privileges to those holding a Technician Class license issued on or after February 14, 1991, who pass a telegraphy examination.[37] This satisfies our objectives of establishing a type of codeless class of license that can be implemented promptly and avoiding negative effects upon the work of the VEs or upon our workload and resources.

C. License requirements

25. *Proposal*. The *Notice* proposed to require applicants for the codeless class of license to pass a sixty question written examination. Thirty questions would be drawn from the current Element 2 question pool, twenty-five questions would be drawn from the current Element 3(A) question pool,[38] and five questions would be drawn from a new pool. In effect, applicants for the new codeless class would be required to pass the same written examination as is required for the current Technician Class license, plus five additional questions.

26. *Comments*. The ARRL comments support our proposal and state that the five additional questions should concern operating practices.[39] Other comments call for even more written questions.[40] Still others recommend fewer written questions.[41] The NCVEC, however, points out that the only purpose of testing is to assure that the licensees are qualified to operate amateur stations on the frequencies authorized for the class of license held.[42] It recommends that the codeless class license requirement be the passing of the existing Element 2 and 3(A) examinations.[43]

27. *Discussion*. As pointed out by NCVEC, the written examination is administered solely to determine if the examinee possesses the operational and technical qualifications required by a station operator to perform properly the duties associated with the privileges of the license sought.[44] Our rules require that each examination question set administered to an examinee must use questions taken from the applicable question pool[45] and each pool must contain at least ten times the number of questions for a single examination.[46] The question pools for Elements 2 and 3(A), therefore, should already contain questions that test whether an examinee has the requisite qualifications to perform properly the operator duties at an amateur station transmitting exclusively above 30 MHz. We are not convinced that the addition of five

questions is needed to establish the operational and technical qualifications of examinees for licenses having these privileges.

28. Each examinee is responsible for knowing the answers to the entire body of questions in the question pool. In the interest of practical examination administration, however, the VEs ask the examinee only a sample number of questions from the pool and they require a passing grade of approximately 74 percent.[47] When technological advancements, operating trends, or rule amendments alter the duties of a particular class of amateur operator license, the effect of our rules is to require that the VECs revise the question pools accordingly. The deletion of privileges below 30 MHz does not call for an increase in the number of questions posed in the written examination for a Technician Class license. Preparing and administering additional examination questions, moreover, would increase the workload of the VEs and VECs. We decline, therefore, to change the number of questions in the written examination elements required for the Technician Class license.

D. Technician Plus Certificate of Successful Completion of Examination

29. *Proposal*. The *Notice* proposed that upon passing a telegraphy examination, a codeless class licensee would be authorized Technician Class privileges below 30 MHz. To avoid an increased license processing burden, our proposal was that the documentation of the passing of the telegraphy examination be indefinitely evidenced by the Certificate of Successful Completion of Examination (CSCE), rather than by the issuance of another license document.[48] Each VEC would be required to provide paper or magnetic listings to the Commission for codeless class licensees who had been issued a CSCE for passing a telegraphy examination.

30. *Comments*. The NCVEC advises that the VECs could permanently document whether an examinee has passed a telegraphy examination that was administered by VEs, but that use of a CSCE for this purpose would result in enforcement difficulties and would create a record keeping burden.[49] The ARRL adds that use of a CSCE for indefinitely documenting that a licensee has passed a telegraphy examination would be unwieldy.[50]

31. *Discussion*. The comments of NCVEC and ARRL, in effect, recommend that the documentation showing that a codeless licensee has later passed a telegraphy examination be accomplished by the Commission issuing a sixth class of operator license. The sole purpose of this sixth class would be to distinguish those codeless Technician Class licensees who subsequently pass the five words per minute telegraphy examination from those who have not. In paragraphs 21 and 22, we discussed why the addition of a sixth class of license is impractical.

32. We do not agree that use of the CSCE to indefinitely document the passing of a telegraphy examination would have any significant negative effects in this instance. The VEs and VECs already perform the necessary work. The VEs now issue a CSCE to each successful examinee. The VECs receive from the VEs the application forms and test results for every examination session. The VECs are required to make their examination records available to the Commission.[51]

33. We do not foresee, moreover, that there will be any increase in enforcement difficulty resulting from using the CSCE to document the passing of a telegraphy examination for an indefinite period. Our rules already authorize a licensee holding a CSCE to exercise the rights and privileges of the higher operator class for a period of up to 365 days.[52] This provision has not resulted in any increased enforcement burden. Section 97.301(e) is amended, therefore, to implement our proposal to use the CSCE to document indefinitely the passing of a telegraphy examination for the purpose of authorizing to codeless Technician Class licensees privileges below 30 MHz. We will confer with the VECs to establish a schedule for reporting the call signs and names of "Technician Plus CSCE Class" operators.[53]

E. Novice Class.

34. *Proposal*. The *Notice* proposed to discontinue issuing new Novice Class operator licenses and to grandfather existing licensees. We particularly invited instructors, VEs and VECs to submit factual information on the time and effort that would be required for persons to prepare for the codeless class written examination as compared to that required for the Novice Class license written and telegraphy examinations.

35. *Comments*. The few comments that addressed our question generally predict that, given the choice between a five words per minute telegraphy examination or an additional written examination, the numbers of newcomers choosing one over the other would be evenly divided.[54] The other prediction was that most newcomers would find additional questions easier to master.[55] The ARRL states that a codeless class would not substitute for the Novice Class, and that discontinuation of the Novice Class license would stifle a large percentage of the newcomers to the service.[56]

36. *Discussion*. The comments reveal that the amateur community, while it supports the establishment of a codeless class, is uncomfortable with the prospect of discontinuation of the Novice Class. The Novice Class is generally intended for beginning amateur radio telegraphers to gain actual experience in sending and receiving telegraphy messages. The comments indicate that the amateur community desires to retain the Novice Class license as an entry level for persons who do not have the knowledge to pass the written examination for the Technician Class license, but who can pass a telegraphy examination.

37. The keystone of our proposal was to reprogram resources currently expended in processing new Novice Class licenses annually to processing the new codeless class licenses. Retention of the Novice Class, however, precludes reprogramming all of those processing resources for the new codeless Technician class. We estimate, however, that with our current resources we should be able to process the applications for new Novice and codeless Technician Class licenses.[57] The Rules we are adopting, therefore, retain the Novice Class license.

F. Other matters.

38. We are persuaded by the comments[58] that our proposal to use the two-letter station identification indicator system[59] to distinguish stations having Technician Plus CSCE control operators is inconsistent with the call sign assignment policy. It would, in effect, cause the stations of codeless Technician Class operators to be identified with

shorter call signs than those having Technician Plus CSCE operators. Shorter station call signs, however, generally are reserved for the more accomplished higher class operators. Further, in three of the frequency bands below 30 MHz that are authorized to Technician Class operators, only a CW emission type using the international Morse code is authorized.[60] The comments that addressed this situation confirmed our belief that it is improbable that a person who cannot pass at least the very slow speed 5 wpm Morse code examination would even attempt to communicate with other amateur stations by telegraphy.[61] In this situation, therefore, any need to distinguish between stations having Technician Class or Technician Plus Class control operators is subordinate to the need for an efficient identification procedure. We are, therefore, not adopting our proposal. We are, however, editorially revising Section 97.119(e) to clarify the station identification procedure.

IV. CONCLUSION

39. In summary, we have decided to provide a codeless class of operator license by eliminating the telegraphy requirement for the Technician Class. Our objective is to provide an entry level codeless operator license opportunity to persons who desire to pursue the purpose of the amateur service and who can demonstrate they are qualified to operate amateur stations that transmit exclusively above 30 MHz. In view of the comments received, we have also decided to retain the Novice Class operator license in order to provide an alternate entry level operator license opportunity to persons who desire to pursue the purpose of the amateur service and who can pass a telegraphy requirement in place of the more comprehensive written examination requirement for the codeless Technician Class operator license.

V. PAPERWORK REDUCTION ACT

40. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520, and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

VI. ORDERING CLAUSES

41. For the reasons stated above, IT IS ORDERED that effective **February 14, 1991,** Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth in the Appendix. Authority for this action is found in Sections 4(i) and 303(c) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(c) and (r).

42. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulation is amended as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064 - 1068, 1081 - 1105, as amended; 47 U.S.C. 151 - 155, 301 - 609, unless otherwise noted.

2. Section 97.119(e) is revised to read as follows:

§ 97.119 Station identification.

* * * * *

(e) When the control operator is a person who is exercising the rights and privileges authorized by § 97.9(b) of this Part, an indicator must be included after the call sign as follows:

(1) For a control operator who has requested a license modification from Novice Class to Technician Class: KT;

(2) For a control operator who has requested a license modification from Novice or Technician Class to General Class: AG;

(3) For a control operator who has requested a license modification from Novice, Technician, or General Class operator to Advanced Class: AA; or

(4) For a control operator who has requested a license modification from Novice, Technician, General, or Advanced Class operator to Amateur Extra Class: AE.

* * * * *

3. Section 97.301(e) is amended by revising the introductory text preceding the table to read as follows:

§ 97.301 Authorized frequency bands.

* * * * *

(e) For a station having a control operator holding a Novice Class operator license, or a Technician Class operator license plus a CSCE indicating that the person passed element 1(A), 1(B), or 1(C), or a Technician Class operator license issued before February 14, 1991:

* * * * *

4. Section 97.501 is amended by revising the introductory text and paragraph (d) to read as follows:

§ 97.501 Qualifying for an amateur operator license.

An applicant must pass an examination for the issuance of a new amateur operator license and for each change in operator class. Each applicant for the class of operator license specified below must pass, or otherwise receive examination credit for, the following examination elements:

* * * * *

(d) Technician Class operator: Elements 2 and 3(A).

* * * * *

FOOTNOTES

[1] 5 FCC Rcd 880 (1990).

[2] Morse code telegraphy emission types are commonly referred to as "CW," the telegraphic abbreviation of the phrase "continuous wave." *See* Section 97.3(c)(1) of the Commission's Rules, 47 C.F.R. § 97.3(c)(1), for a listing of the CW emission types.

[3] *See* No. 2735 of the ITU Radio Regulations (Geneva, 1979) (hereafter international Radio Regulations).

[4] *Id.*

[5] The license classes are, in ascending steps, Novice, Technician, General, Advanced, and Amateur Extra. The examinations cover three levels of telegraphy skill. They are 5, 13, and 20 words per minute (wpm). The examinee must also pass written examination elements, depending upon the operator license class sought. *See* Sections 97.501 and 97.503 of the Commission's Rules, 47 C.F.R. §§ 97.501 and 97.503.

[6] *See Notice of Proposed Rule Making*, Docket No. 20282, 39 Fed. Reg. 44042 (1974) and *Notice of Proposed Rule Making*, PR Docket No. 83-28, 48 Fed. Reg. 4855 (1983).

[7] Section 97.1 of the Commission's Rules, 47 C.F.R. § 97.1, expresses the fundamental purpose of the amateur service in the United States in five principles: (a) Recognition and enhancement of the value of the amateur service to the public as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications; (b) Continuation and extension of the amateur's proven ability to contribute to the advancement of the radio art; (c) Encouragement and improvement of the amateur service through rules which provide for advancing skills in both the communication and technical phases of the art; (d) Expansion of the existing reservoir within the amateur service of trained operators, technicians, and electronic experts; (e) Continuation and extension of the amateur's unique ability to enhance international goodwill.

[8] For example, see comments of Edward P. Murphy at 1, Janet V. Whitney at 6, Gary Withington at 1.

[9] For example, see comments of Jack Bitzer at 3-4, Gordon Girton at 2-3.

[10] For example, see comments of John A. Carroll at 1-9, Scott B. Laughlin at 1, and Gordon Girton at 2.

[11] For example, see comments of O.D. Williams at 1, Michael Barry at 1, Joint Comment of Thomas A. Geis, Georgeann M. Geis, and Frederick R. Geis at 1.

[12] *Notice* at para. 5.

[13] *Id.* at para. 15.

[14] QCWA comments at 3.

[15] ARRL comments at 6.

[16] *Id.* at 2.

[17] Comment of NCVEC at 4.

[18] Comment of ARIG at 5.

[19] Comment of Alan Kaiser at 1.

[20] Comment of Michael C. Migliaccio at 1.

[21] Comment of Patrick D. Bouldin at 2.

[22] Comment of Joel Dunn at 1.

[23] Comment of Donald J. Ray at 1.

[24] *See* Section 97.3(c) of the Commission's Rules, 47 C.F.R. § 97.3(c), for a description of and the emission types associated with each of these terms.

[25] *See* para 12, *supra*.

[26] The CSCE (certificate of sucessful completion of an examination) is a document issued by the VEs to an examinee. It indicates which examination element(s) the examinee has passed. *See* Sections 97.505(a) and 97.9(b) of the Commission's Rules, 47 C.F.R. §§ 97.505(a) and 97.9(b).

[27] NCVEC comments at 9.

[28] QCWA comments at 4.

[29] ARRL comments at 11.

[30] ARRL comments at 8.

[31] NCVEC comments at 6.

[32] Comments of QCWA at 6. To qualify for a Novice Class operator license, an examinee must pass a 5 wpm telegraphy examination and a thirty question written examination. To obtain a Technician Class operator license, an examinee must pass the Novice Class examination elements and an additional written test of twenty-five questions.

[33] Above 30 MHz, Novice Class licensees are authorized privileges on the 222.10-223.91 MHz segment of the 1.25 meter band and the entire 23 centimeter band.

[34] For example, see comments of QCWA at 8, Phillip David Howard at 3, Conrad Ekstrom at 1, Jay W. Underdown at 3, and Michael R. Burgin at 1.

[35] During fiscal year 1990, of the 26,134 persons who entered the amateur service, 2,617 persons did so by obtaining the Technician Class license.

[36] Existing Technician Class licensees are authorized all possible privileges above 30 MHz. Below 30 MHz, these licensees are authorized CW emission privileges in portions of the 80, 40, 15, and 10 meter bands, RTTY and data emissions in the frequency segment 28.100-28.300 MHz, and phone emissions in the frequency segment 28.300-28.500 MHz.

[37] For convenience, holders of a Technician Class license issued prior to February 14, 1991, and holders of both a Technician Class license and a CSCE for passing a telegraphy examination are referred to hereafter as "Technician Plus CSCE Class" operators to distinguish them from holders of the codeless Technician Class license only.

[38] Element 2 is the fundamental written examination required for every class of amateur operator license. Element 3(A) is a written examination concerning the additional privileges of the Technician Class operator license. *See* Section 97.503(b) of the Commission's Rules, 47 C.F.R. § 97.503(b).

[39] ARRL comments at 13. The ARRL proposed that the current twenty-five question Element 3(A) written examination be expanded by five questions and that the current thirty question Element 2 written examination continue as is.

[40] For example, see comments of Thomas I. Geiger at 6, William L. Glover at 1, and John C. Thomas at 1.

[41] For example, see comments of ARIG at 7, Interstate Repeater Society, Inc. at 3, Michael V. Morrelli at 1, and QCWA at 4.

[42] NCVEC comments at 11.

[43] NCVEC comments at 8. The current Element 2, 30 question written examination would be reduced by 5 questions and the current Element 3(A), 25 question written examination would be used as is in NCVEC's proposal.

[44] *See* Section 97.503(b) of the Commission's Rules, 47 C.F.R. § 97.503(b) and Section 303(l) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(l). *See* also No. 2736 of the international Radio Regulations.

[45] *See* Section 97.507(b) of the Commission's Rules, 47 C.F.R. § 97.507(b).

[46] *See* Section 97.523 of the Commission's Rules, 47 C.F.R. § 97.523.

[47] *See* Section 97.503(b) of the Commission's Rules, 47 C.F.R. § 97.503(b).

[48] *Notice* at para. 22.

[49] Comments of NCVEC at 6.

[50] ARRL comments at 13.

[51] *See* Section 97.519 of the Commission's Rules, 47 C.F.R. § 97.519.

[52] *See* Section 97.9(b) of the Commission's Rules, 47 C.F.R. § 97.9(b). In the case of a codeless Technician Class licensee who holds a CSCE for only a telegraphy element, the 365 day limitation on operator privileges would not apply because the CSCE does not indicate that the licensee has passed the necessary examinations for a higher class operator license.

[53] The data base for codeless Technician Class licensees who subsequently pass a telegraphy examination will be incorporated into the amateur service licensee data base when the necessary capability becomes available.

[54] Comment of Mark Forbes at 2.

[55] Comments of Elvin D. Lytle at 1, National Amateur Radio Association at 5, Douglas N. Stracener at 3.

[56] Comments of ARRL at 8.

[57] In fiscal year 1990, the Commission issued 20,704 Novice Class licenses, each of which required the processing of a license application. The Commission also processed 15,468 applications from Novice Class licensees that upgraded to Technician Class, and 2,617 applications from individuals who entered the amateur service by obtaining a Technician Class license.

[58] Comments of National Amateur Radio Association at 7.

[59] *See* Section 97.119(e) of the Commission's Rules, 47 C.F.R. § 97.119(e), for details of the indicator system.

[60] *See* Section 97.307(f)(9) of the Commission's Rules, 47 C.F.R. § 97.309(f)(9).

[61] For example, see comments of Thomas I. Geiger at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-35

In the Matter of

Definition of a Cable Television System

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1990; Released: December 21, 1990

By the Commission:

I. INTRODUCTION

1. The Commission issued the *Notice of Proposed Rule Making* in this proceeding[1] to clarify its interpretation of the statutory term "cable system" as defined in the Cable Communications Policy Act of 1984.[2]

2. A cable system is defined in section 602(6) of the Cable Act and in section 76.5(a) of the Commission's rules as

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . .

These same sections exclude from the definition

> a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way.

3. In adopting rules to implement the Cable Act in 1986, the Commission had concluded, based on certain legislative history of the Act, that when multiple unit dwellings are involved, the distinction between a cable system and other types of video distribution systems rested solely on whether or not the facilities used any public right-of-way. [3] Decisions by two federal district courts, however, raised significant questions about this and other prevailing interpretations of the Act. In *City of Fargo v. Prime Time Entertainment, Inc.*,[4] the court determined that a television distribution system within a building became a cable system when it was connected by infrared transmissions with a video distribution system in a second building, because the two buildings were not commonly owned, controlled, or managed. In *Pacific & Southern Co., Inc., v. Satellite Broadcasting Networks, Inc.*,[5] the court suggested that the interception of local television broadcast signals and their national retransmission via space satellite to individual home satellite-receive facilities could constitute a cable television system within the meaning of Section 602(6) of the Communications Act.

4. To clarify these issues we sought comment on whether facilities serving multiple unit dwellings that do not use public rights-of-way might in some instances be cable systems within the Act's definition. We further sought comment on the broader implications of treating facilities connected only by radio (or infrared) transmissions and making use of no other interconnecting wires or cables as cable systems. Twenty-three parties filed comments and thirteen parties filed replies in response to the *Notice*.

II. SUMMARY OF CONCLUSIONS

5. After carefully considering these comments, we conclude that the term cable system as used in the Act encompasses only video delivery systems that employ cable, wire, or other physically closed or shielded transmission paths to provide service to subscribers and only those that use such technology outside individual buildings. Radio services that do not use such closed transmission paths at all (or if they do, systems using such technology only inside individual buildings), including direct broadcast satellites and so-called "wireless cable" (multipoint distribution service (MMDS), instructional fixed television service (ITFS), and operational fixed service (OFS) facilities), are therefore not cable systems under the Act. Satellite master antenna systems (SMATV) and master antenna systems (MATV) that use wire or cable only within the premises of a single multiple unit building are not cable systems. MATV or SMATV systems serving more than one multiple unit dwelling interconnected only by radio or infrared facilities also are not cable systems. Finally, if multiple unit dwellings are connected to each other by physically closed transmission paths, such SMATV or MATV systems are cable systems unless the buildings are under common ownership, control, or management and do not use public rights-of-way. The basis for each of these conclusions is discussed in detail below.

III. DISCUSSION

A. "CLOSED TRANSMISSION PATH" REQUIREMENT

6. *DBS, MMDS, and Other Radiating Technologies Excluded.* In the *Notice*, we expressed our tentative view that Congress did not intend to include radio transmission services, such as DBS and MMDS, within the Act's definition of a cable system. We also expressed our concern that the referenced court decisions "could presage other possibly inapt extensions of the definition [of a cable system] that would require the treatment of additional wireless video delivery systems as cable systems as well." After considering the comments directed to this issue, we conclude that our initial view was correct.

7. As indicated above, the statutory definition contains a threshold requirement that a cable system involve facilities consisting of a set of "closed transmission paths." The term closed transmission path is not defined in the Act, and the House Report does not directly discuss the meaning of this term. However, the Senate version of the Cable

Act used a very similar term --"closed transmission medium" -- in its definition of a cable system. That term was to be statutorily defined as

> media having the capacity to transmit electromagnetic signals *over a common transmission path such as coaxial cable, optical fiber, wire, waveguide, or other such signal conductor* or device . . . .[6]

The original Senate version of the Cable Act thus made explicit that, by referring to a "closed" transmission medium, the drafters contemplated that cable system facilities would use physically closed or shielded conducting media or "transmission paths," rather than radio waves alone. While the original Senate version of the Cable Act was not passed, we have no basis for thinking that the Senate and House did not share a common understanding of the virtually identical terms "closed transmission path" and "closed transmission media" (which itself was defined as a "transmission path") that were used in their respective definitions of cable systems. Indeed, the term "cable" itself is commonly defined by dictionaries as an insulated "electrical conductor," which tracks the Senate's reference to "signal conductors" when defining cable as a closed transmission medium. In the absence of any evidence in the legislative history to the contrary, the Senate language is highly probative of the congressional intent underlying the statute's use of the term "closed transmission path" to define a cable system.

8. Our interpretation is further supported by passages in the Senate and House Reports that use virtually identical language when referring to types of video delivery systems, including MATV, SMATV, MDS, DBS, and STV, that both bodies understood to be different from cable systems. The House Report, for example, stressed that

> in adopting this legislation, the Committee is concerned that Federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming. National communications policy has promoted the growth and development of *alternative delivery systems* for these services, *such as DBS, SMATV and subscription television*. The public interest is served by this competition, and it should continue.[7]

Similarly, the Senate Report on S. 66 (the original Senate version of the Cable Act), pointed out that cable faces major competition from such services as MDS, MATV, SMATV, DBS, STV . . . and other media."[8]

9. In short, both bodies of Congress expressed virtually identical views concerning the types of services -- DBS, MDS, and STV -- that were not considered cable systems. All of these services used radio waves (without physical conduction media or devices) and thus stand in sharp contrast to the "closed transmission paths" referred to in both the Senate and House versions of the Act.

10. In addition, the very structure of the Cable Act as a whole clearly contemplates a regulatory system where there is a strong nexus with individual local communities through the franchise process. Such a nexus is clearly absent, for example, in the direct broadcast satellite situation, which further suggests that inclusion of radio based video distribution systems within the cable system definition was not intended. As a number of commenting parties point out, alternative delivery systems such as MDS and DBS could not practically be regulated under the statutory scheme adopted in the Cable Act. The dual federal-local jurisdictional approach to regulating cable television service is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights of way in the communities they serve.

11. Furthermore, this interpretation of the term is consistent with the Commission's own view of the physical characteristics of cable systems, as evidenced by its decisions and rules prior to enactment of the Cable Act. While the Commission's initial 1965 definition's reliance upon "redistribut[ing] . . . signals by wire or cable . . .,"[9] was amended in 1977 to eliminate reference to "by wire or cable."[10] the Commission specifically stated that this change was not intended to be "interpreted to include such non-cable television broadcast station services as Multipoint Distribution Systems . . . ."[11] In enacting the Cable Act, Congress acted against a background of almost thirty years of Commission regulation in the cable area, and commenters have offered no evidence that it intended to alter in any fundamental way the basic meaning of the term "cable system" as reflected in prior Commission decisions and as applied to these alternative radio frequency using services. Absent such evidence, we shall not infer that Congress intended a definition of the term that is significantly different in these respects from the Commission's prior understanding.[12]

12. *MATV and SMATV Systems*. As discussed above, the Cable Act's definitional reference to "closed transmission paths" requires that a video delivery system consist of some type of physically closed transmission path to subscribers, such as wire, cable, or fiber optics, before it may be deemed a cable system; transmissions by radio alone do not satisfy this criterion. "Traditional" cable systems, that are within the definition, use coaxial cable laid under city streets or along telephone or electric utility lines.[13] However, large apartment buildings also may use coaxial cable to distribute programming within the confines of a single building. Specifically, a master antenna television (MATV) system uses a single antenna to capture a radio signal off the air and deliver it to tenants in a multiple unit building using coaxial cables that run throughout the building. Similarly, a satellite master antenna (SMATV) system receives radio signals transmitted by satellite to an earth station atop a multiple unit building and distributes the signals through an MATV system within the building.

13. In the *Notice*, we requested comment on whether SMATV systems might be considered cable systems and expressed the tentative view that they were not. In addressing this matter, we consider first the applicability of the definition to such operations using cables internally but connected externally by radio communications (satellite, microwave, infrared, or other non-closed communications systems) and, second, to such operations connected by external cables. As explained below, we conclude that neither MATV nor SMATV systems as such are covered by the Cable Act as cable systems, but that such facilities may become cable systems if they consist of multiple buildings interconnected by cable. Specifically, we find that SMATV or MATV buildings connected by radio communications are not cable systems because they do not use "closed transmission paths" within the meaning of the statutory definition.[14] By contrast, SMATV or

MATV buildings interconnected by cable or wire will be considered cable systems, unless they fall within the private cable exemption discussed below.

14. Whether the Cable Act's definition of a "cable system" was intended to include MATV and SMATV systems can best be discerned by examining both the legislative history of the provision and Commission precedents existing at the time the Act was passed. In this regard, it is relevant that by the time the statutory language was drafted, the Commission already had exempted SMATV and MATV systems from its definition of a cable system. This exclusion was reflected both in the original definition enacted in 1965 and in the subsequent clarification enacted in 1977. Specifically, the 1965 definition excluded a facility "which serves only the residents of one or more apartment dwellings under common ownership, control or management."[15] The 1977 definition excluded a facility "that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control or management."[16]

15. Section 602(6) of the Cable Act contains a virtually identical exclusion in the statutory definition of a cable system.[17] Significantly, there is no evidence in the legislative history that Congress intended for the same words to have a different meaning than had previously been ascribed to them by the Commission.[18] We accordingly conclude that pre-existing Commission precedents should be used to determine how various types of SMATV and MATV operations should be treated under the Cable Act. As discussed more fully below, those precedents establish that the use of wire or cable solely within a building's premises did not make a SMATV or MATV operation a "cable system" for jurisdictional purposes. As a result, neither single-building SMATVs or MATVs, nor multi-building SMATVs or MATVs interconnected solely by radio communication, were deemed to be cable systems by the Commission, even when the buildings were not commonly controlled, owned, or managed.

16. The starting point in our analysis is those cases recognizing that a SMATV's or MATV's use of wire or cable only within the premises of a building is fundamentally different than use of cable as a medium of communications outside a building, both from a state and federal jurisdictional standpoint. In 1975, when interpreting its cable definition and exclusions, the Commission addressed the exemption for multiple unit dwellings by emphasizing that "there is a real and effectual difference between *a single structure that has been wired to provide antenna service* to its component residences, and an *externally wired community* of individual homes."[19] The Commission also noted its expectation that, as to such internally wired buildings, "[b]ecause no use is made of local rights-of-way before commencing operation."[20] As a result, such systems were not deemed to be cable systems for jurisdictional purposes.

17. In a subsequent *Report and Order*, the Commission further explained that the term "subscriber" in the cable definition "includes the occupants of one or more multiple occupancy buildings" if that " *MATV system . . . is interconnected to a cable television system* . . . ."[21] The Commission thus again expressed its understanding that MATV subscribers would not be "cable" subscribers unless the internal MATV system was interconnected with and part of a "cable" system. On reconsideration in that same proceeding, moreover, the Commission flatly rejected arguments that a MATV system should be considered a cable systems "because it makes no regulatory difference whether a cable systems is high-rise or low-rise, detached or unattached, multi-family or otherwise." The Commission declined even to exercise jurisdiction, finding MATV "a different entity for regulatory purposes" and reiterated its view that "MATV systems [are] substantially different from traditional cable systems so as to justify continued exemption from our regulations . . . ."[22]

18. These decision made clear that the use of wire or cable within the confines of a multi-unit building is not sufficient to bring the service within the jurisdictional bounds of a "cable" system. Consistent with this fundamental understanding, we have discovered no cases prior to the Cable Act in which the Commission ever treated MATV and SMATV buildings as cable systems unless the individual buildings were interconnected to each other by wire or cable. Conversely, where MATV buildings were connected by radio alone, the Commission did not treat the facilities as cable systems, even where the buildings were not commonly-owned and thus were not within the exemption for multiple unit dwellings.

19. The *Video International Productions, Inc. / Cable Dallas* cases, for example, illustrate the type of SMATV system that the Commission viewed as a cable system.[23] In those cases an applicant sought to demonstrate that it was a cable system.[24] It provided SMATV service to several groups of apartment buildings and none of the buildings was under common ownership, management, or control. Each building within a group, however, was interconnected with cable transmission lines. Although none of the buildings was commonly owned and each building was served internally by a MATV system, the Bureau and Commission decisions left no doubt that these factors alone were insufficient to bring the system within the definition of a cable system. The Bureau decision held that

> each group of buildings *interconnected with cable transmission lines* constitutes a separate cable system to which CARS service is permissible under . . . the Rules . . . . The fact that each of the apartment buildings served may own the *terminating cable pathways within its confines* is not determinative of [the applicant's] status as a cable television system. It is the *interconnection* of each separately owned apartment building which qualifies [the applicant] as a cable television system.[25]

In addition to making clear that the wiring within a single multiple unit dwelling did not render a SMATV system a cable system, the Bureau clearly indicated that, for a group of SMATV apartment buildings not under common ownership to be a "cable" system, the buildings must be interconnected by "cable." Indeed, the Commission's rule required that the microwave relay authorization in question could only be awarded to cable system applicants. As a practical matter, this requirement foreordained that the threshold interconnection of SMATV buildings to establish a cable system could be accomplished only by wire and not by radio links. Subsequently, in a related case involving the same system, the Commission confirmed that it was the physical interconnection of each individual building by cable that rendered the system a cable system.[26]

20. Conversely, and prior to *Cable Dallas*, the Commission had made clear that non-commonly owned MATV apartment dwellings in a system connected by a radio microwave multipoint distribution service (MDS) is not a cable system. In *Orth - O - Vision*,[27] the Commission preempted state regulation of a system serving 35, separately owned MATV apartment houses connected by MDS and left no doubt that it did not view the MDS connected MATV systems as cable services. The Commission distinguished its preemption of the services at issue from its prior decision to relinquish to the state "franchising jurisdiction" over cable. It observed that "cable television, by its very nature, makes significant use of public streets and rights-of-way" and thus the cable precedent did "not in any way qualify [the FCC's] jurisdiction over other forms of interstate communication . . . ."[28] Similarly, when preempting state regulation of a SMATV service in *Earth Satellite Communications, Inc.* [29] ("ESCOM"), the Commission cited the *Cable Dallas* decision as indicative of the types of SMATV systems that could be defined as cable systems. As noted above, the Commission had concluded in *Cable Dallas* that SMATV buildings interconnected by cable are within the Commission definition of a cable system.

21. Based on the foregoing, we believe that the Commission's precedents prior to the Cable Act established principles that: (1) use of wire or cable solely within a building's premises did not trigger jurisdiction over the system as a wire or cable communications service; (2) MATV or SMATV systems contained within a single building were not cable systems; and (3) where two or more multiple unit dwellings were served by MATV or SMATV systems that were connected by radio transmission facilities alone, the systems were not cable systems, even though the several buildings were not commonly owned, controlled, or managed.[30] Since there is no indication in the Cable Act or its legislative history that the congressional drafters intended to upset these prior principles, we conclude that they should be applied when applying the statutory definition of a "cable system." As previously noted, that definition states that a facility must use a set of "closed transmission paths" in order to be considered a cable system for purposes of the Act. We believe that this language should be interpreted to mean that facilities which use wire solely *within* a building are not "cable" systems under the Act.[31] Stated differently, we conclude that the "closed transmission path" requirement of the statute contemplates that wire or cable must be used outside the premises of MATV and SMATV buildings before the facilities may be deemed a cable system under the statutory definition.

22. Accordingly, single building MATV or SMATV systems will not be considered "cable systems" for purposes of the Cable Act or our rules, since such systems do not use wire outside the building.[32] Under a similar analysis, MATV or SMATV buildings interconnected by radio facilities alone also will not be deemed to be "cable systems." By contrast, MATV or SMATV buildings that are connected by wire, cable, or other closed transmission paths will be considered cable systems, unless they fall into the "private cable" exemption set forth in the Cable Act. The scope of that exemption is discussed below.

B. PRIVATE CABLE EXCLUSION

23. Section 602(6) of the Cable Act and Section 76.5(a) of our rules exclude from the definition of a cable system "a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way." Where SMATV and MATV buildings[33] are interconnected by closed transmission paths, Commission precedent and the plain language of the statutory exemption make clear that the services must be considered cable systems unless (1) the buildings are commonly owned, controlled, or managed and (2) the facilities do not use any public rights-of-way.

24. " *Common Ownership, Control, or Management* " *Requirement*. When incorporating the statutory exemption for private cable systems into our rules, we suggested that we would rely solely on whether the facility crossed a public right-of-way.[34] In the *Fargo* decision, however, the district court expressly rejected this conclusion, claiming that "it contravenes unambiguous Congressional intent."[35] In the *Notice*, we stated our inclination "to concur in the court's view that the exception is not available unless the multiple unit dwellings served by a video programming delivery system are commonly owned, controlled or managed *and* there is no crossing of a public right-of-way involved."[36]

25. Most commenters concurred with this view. Those who did not[37] interpreted the Act's legislative history to support their argument that Congress intended the use of a public right-of-way to be key to inclusion or exclusion from the definition. In this regard, the House Report on the Cable Act states that the definition exempts "a facility or combination of facilities that serves only subscribers in one or more multiple unit dwelling (in other words, a satellite master antenna television system), *unless such facility or facilities use a public right - of - way*. "[38]

26. Notwithstanding the above cited language, we believe that our inclination, as stated in the *Notice*, was correct. Indeed, a contrary interpretation would appear to render the "common ownership, control, or management" portion of the statutory definition superfluous, in violation of the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."[39] Because the plain language of the statute is unambiguous, resort to legislative history is unnecessary.[40] In any event, the "common ownership, control, or management" aspect of the exception has been a part of our definition of a cable system from the beginning[41] and we do not now believe the language added by the Cable Act pertaining to public right-of-way use was intended to expand the types of facilities exempted from coverage of the Act. We conclude, therefore, that in some circumstances where multiple unit dwellings are involved -- specificaly, where cable is used to interconnect individual buildings -- the ownership, control, and management of the buildings is relevant to determining where the system is a cable system.[42]

27. *Public Right - of - Way Use*. In order to qualify for the private cable exemption, a facility not only must serve buildings that are commonly owned, controlled, or managed but also must not use any public right-of-way. We therefore sought comment in the *Notice* "with respect to the question of what constitutes a crossing of a public right-of-way, including but not limited to the use of infrared technology."[43] As noted by several parties, the

specific statutory language refers to "uses" of a public right-of-way and our use of the term "crossing" was not meant to imply anything different.

28. As discussed above, radio transmissions, including infrared transmissions, do not constitute "closed transmission paths" under the statutory definition of a cable system. Accordingly, such transmissions do not meet even the threshold definitional requirement of a cable facility. In addition, most parties commenting on this issue stated their belief that Congress did not intend to include within the meaning of the term "use" of a public right-of-way the mere passing over of such a right-of-way by electromagnetic radiation. We agree. As articulated by Southwestern Bell Corporation and others, radio waves may cross a public right-of-way but do not use it. We believe it is well established that radio transmissions, including line of sight transmissions, such as the point-to-multipoint transmission used in MDS, do not use public rights-of-way. For example in *New York State Commission on Cable Television v. FCC*, the court stated that "MDS is different from franchised cable in one critical respect: it is operated solely on private property and makes no use of public rights-of-way."[44]

29. This conclusion comports fully with Section 621(e) of the Act, which left unaffected Commission decisions limiting State authority to license or regulate MATV or SMATV type facilities not using any public right-of-way. The House Report states

> Section 621(e) clarifies that this bill does not affect the authority of a state or political subdivision to license or regulate an SMATV system which does not use public right-of-way. Recently the FCC sought to preempt state regulation. *Earth Satellite Communications, Inc* . . . . The Committee does not intend anything in this title to affect the FCC's decision, or to affect any view of this decision by the courts.[45]

In both its *Orth - O - Vision* [46] and *Earth Satellite Communications* [47] decisions, the Commission had stated that a central basis for its decision to permit state franchise regulation of cable systems was that such systems use of public rights-of-way, whereas preempted, non-cable MATV and SMATV (in which cable is used only within a building's premises) do not.[48] Accordingly, crossing but not "using" a public right-of-way by infrared or radio relay facilities does not change the applicability of the policies reflected in Section 621(e) and in the *Ortho - O - Vision* and *Earth Satellite Communications* decisions.

30. Whether a facility uses a right-of-way, of course, remains relevant to whether a multi-building system interconnected by closed transmission paths falls within the private cable exemption. As noted previously, in order to quality for this exemption, the facility not only must serve multiple unit dwellings that are commonly owned, controlled, or managed, but it also must not use a public right-of-way. If the facility does cross a public right-of-way, it will be considered a cable system for purposes of the Cable Act and our rules.

C. OTHER ISSUES RAISED BY PARTIES

31. The comments of Spectradyne and the late-filed reply comments of the City of Chicago (which we shall accept in the interest of having a complete record) raise certain issues regarding the status of entities that use common carrier telephone lines to transmit programming to hotels and multiple unit dwellings. These matters are more generally at issue in our pending proceeding relating to telephone-cable cross-ownership,[49] and are not at issue in today's decision.

32. We note, however, that for an operation to be defined as a cable system it must have "subscribers." Although the term "subscriber" is not a defined term in the Cable Act, it is now and was defined at the time of passage of the Cable Act in the Commission's rules as "a member of the general public who receives broadcast programming distributed by a cable television systems and *does not further distribute it*. "[50] Thus, for example, if video service is delivered to hotels for resale by these establishments over internal MATV wiring to lodgers, then that service provider (i.e. the party delivering programming to the hotels) has no "subscribers" as that term is defined in the Commission's rules. Because providing service "to multiple *subscribers* within a community"[47] is a critical element in the statutory definition, such an operation – if it operates as a wholesaler and has no "subscribers" of its own – may not come within the cable system definition. We note, moreover, that hotels are within the exemption for multiple unit dwellings and, as clarified herein, where more than one such multiple unit building is interconnected only by radio transmission or other non-closed transmission facilities (or use closed paths but are commonly owned and have no street crossing), such an entity is not a cable system.[51]

33. The National Cable Television Association suggests in its comments that there are particular cable rules that might well be applied to entities other than cable systems and urges that such matters "can be given a more thorough airing in a discrete proceeding." NCTA and the Community Antenna Television Association also raise an issue concerning signal leakage by non-cable distribution systems, and urge that a separate Rule Making proceeding be undertaken on this question.[52] These matters are beyond the scope of the instant proceeding and will not be addressed here. Should these parties wish to pursue these matters further, they should file a petition for Rule Making in accordance with Section 1.401 of the Commission's Rules.

IV. CONCLUSION

34. To resolve significant issues concerning the scope of the statutory term "cable system," we have carefully reviewed in this proceeding the language and legislative history of the Cable Act and the Commission's precedents interpreting the term. As discussed above, we have concluded that facilities must be interconnected by physically closed or shielded transmission paths to meet the statute's threshold requirement for a cable system. Use of radio or infrared transmissions alone does not meet this threshold criterion. The use of wire or cable exclusively within the premises of multiple unit buildings (MATV and SMATV systems) also does not fall within the statutory definition. Thus, use of radio facilities to connect more than one multiple unit dwelling served by a MATV or SMATV system does not make that system a cable system. However, where a wire or cable is used to interconnect MATV or SMATV equipped buildings, the system is a cable facility unless the several buildings are commonly owned, controlled, or managed and the system's physically closed

interconnection paths do not use a public right-of-way. Although these general principles may not resolve every possible issue concerning the scope of the statutory definition, they should provide ample guidance in interpretations of the statutory term and, in our view, will significantly dispel the confusion that has arisen.

Regulatory Flexibility Act Final Analysis

35. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is follows:

Need for and purpose of the rules.

The Cable Communications Policy Act of 1984 defined what a cable system is for purposes of the Act. In response to two district court decisions, we have readdressed our implementation and interpretation of the statutory definition to ensure that we carry out the intent of Congress.

Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and the changes made as a result.

A. *Issues raised*. No issues or concerns were raised in response to the initial regulatory flexibility analysis.

B. *Assessment*. Because there were no comments directed to the initial regulatory flexibility analysis, the Commission views the initial analysis as correct and no additional assessment is necessary.

C. *Changes made as a result of such comments*. None.

Significant alternatives considered and rejected.

The Commission considered all the alternatives presented in the Notice and considered all the comments directed to the various issues in the *Notice*. After carefully weighing all aspects of this proceeding, the Commission has adopted the interpretation of the term cable system that appears most reasonable under the mandate of the Cable Act.

36. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 303(r) and 602(6) of the Communications Act, 47 U.S.C. Sections 154(1), 303(r), and 522(6), the interpretations of the term cable system set forth in this proceeding ARE ADOPTED.

37. IT IS FURTHER ORDERED that the "Motion for leave to file Reply Comments *Nunc Pro Tunc* July 10, 1989" filed August 18, 1989 by the City of Chicago IS GRANTED.

38. IT IS FURTHER ORDERED that the "Motion to Strike" filed August 8, 1989, by the National Satellite Programming Network, *et al.*, IS DENIED.

39. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

List of Commenters

1. American Tele/Lease, Inc.
2. BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company
3. Capital Cities/ABC, Inc.
4. Capital Wireless Corporation
5. City of New York
6. Community Antenna Television Association, Inc.
7. George Mason University Foundation, Inc.
8. Hughes Communications Galaxy, Inc.
9. Liberty Cable, Inc.
10. Major League Baseball, National Basketball Association, and National Hockey league
11. Microband Companies Incorporated
12. National Broadcasting Company, Inc.
13. National Cable Television Association, Inc.
14. National Satellite Programming Network; Beach Communications, Inc.; Casden Cable Company; CMJ Communication; Maxtel Limited Partnership MGM Satellite Vision, Inc.; Mid-Atlantic Communications, Inc.; Network Multi-Family Security Corp.; Pacific Cablevision; Telecom Satellite System Corp.; Telesat Cablevision, Inc.; 21st Century Technology Group, Inc.; WCTV-Tampa Bay, Inc.; and Western Cable Communications, Inc.
15. National Telephone Coopertive Association
16. Pacific Bell and Nevada Bell
17. Pellegrin & Levine, Chartered
18. PrimeTime 24, Joint Venture
19. Southwestern Bell Corporation
20. Spectradyne, Inc.
21. Todd Integrated Systems, Inc. and Peoples Choice TV, Inc.
22. WH-TV Broadcasting Corporation d/b/a Telecable of Puerto Rico
23. Wireless Cable Association, Inc.

Reply Comments

1. American Tele/Lease, Inc.
2. Association of Independent Television Stations, Inc.
3. Bell South Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company
4. Capital Wireless Corporation
5. City of Chicago
6. Cross Country Telecommunications, Inc.
7. George Mason University Foundations, Inc.
8. National Cable Television Association, Inc.

9. National Satellite Programming Network; Beach Communications, Inc. Casden Cable Company; CMJ Communications; Maxtel Limited Partnership; MGM Satellite Vision, Inc.; Mid-Atlantic Communications, Inc.; Network Multi-Family Security Corp.; Pacific Cablevision; Telecom Satellite Systems Corp.; Telesat Cablevision, Inc.; 21st Century Technology Group, Inc.; WCTV-Tampa Bay, Inc.; and Western Cable Communications Inc.

10. Pacific West Cable Company and Preferred Communicatins, Inc.

11. Pellegrin & Levine, Chartered

12. Todd Integrated Systems, Inc. and People Choice TV, Inc.

13. Wireless Cable Association, Inc.

FOOTNOTES

[1] 4 FCC Rcd 2088 (1989).

[2] Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[3] *Cable Communications Act Rules (Reconsideration)*, 104 FCC 2d 386, 396-97 (1986).

[4] Case No. A 3-87-47 (D.N.D. March 28, 1988) (unpublished).

[5] 694 F. Supp. 1565 (N.D. Ga. 1988).

[6] S. 66, Section 603(11)(emphasis added); S. Rep. 98-67, 98th Cong., 1st Sess. 35 (1983).

[7] H.R. Rep. 98-934, 98th Cong., 2d Sess. 22-23 (1984) (emphasis added).

[8] S. Rep. 98-67, 98th Cong., 1st Sess. 30 (1983).

[9] *First Report and Order in Docket Nos. 14895 and 15233*, 38 FCC 683, 741 (1965). *See also Second Report and Order in Docket 15971*, 2 FCC 2d 725, 729, 793-94 (1966), in which the Commission exercised jurisdiction over cable as "communication by wire," defined in Section 3(a) of the Act as transmissions "by aid of wire, cable, or other like connection . . . ." *Compare* Section 3(b), defining "radio communication" as "transmission by radio . . . ."

[10] *First Report and Order in Docket 20561*, 63 FCC 2d 956 (1977).

[11] *Id.* at 965. The change appears to have anticipated the possibility of optical fiber transmission paths replacing traditional coaxial cable distribution plant.

[12] *Cf. City of New York v. FCC*, 486 U.S. 57 (1988). In view of our conclusions above, we reject the argument of the National Cable Television Association, Community Antenna Television Association, City of Chicago, and Association of Independent Television Stations that point-to-point radio transmission (as distinguished from point-to-multipoint) should be treated as closed transmission paths. There is no support for this position in either the Cable Act, its legislative history, or our precedents. We do not, however, suggest that cable facilities must use physically enclosed transmission path exclusively in order to retain their status as cable systems. Obviously, many cable systems utilize point-to-point microwave radio links in addition to wire or cable to relay programming to the cable community, to pick up programming from remote locations within the community, and to connect headends and subheadends within the area served. Use of such radio facilities clearly does not remove what is otherwise a cable system from the coverage of the definition because the connected parts of such facilities would be independently covered by the definition.

[13] *See New York State Commission on Cable Television v. FCC*, 749 F. 2d 804 (D.C. Cir. 1984).

[14] As we explain below, this is so even though these systems use cables within individual buildings.

[15] 38 FCC at 741.

[16] 63 FCC 2d at 965.

[17] We note that the statutory definition contains a requirement that facilities within the exemption for multiple unit dwellings not use any public right-of-way, a requirement that was not included in the Commission's pre-existing definition of a cable system. This additional statutory requirement appears to be related mainly to Commission decisions and policies regarding its preemption of state regulation of SMATV and MATV facilities. *See* Section 621(e) of the Act and the discussion at paragraph 29 below.

[18] The legislative history does not provide precise guidance except to make clear that SMATV and MATV system generally are excluded from the definition of a cable system. *See* S. Rep. 98-67, 98th Cong., 1st Sess. 18-19 (1983); H.R. Rep. 98-934, 98th Cong., 2d Sess. 44 (1984).

[19] *Notice of Proposed Rule Making in Docket 20561*, 54 FCC 2d 824, 826 (1975)(emphasis added).

[20] *Id.* at 835.

[21] *Report and Order in Docket 20561*, 63 FCC 2d 956, 966 (1977) (emphasis added).

[22] *Memorandum Opinion and Order in Docket 20561*, 67 FCC 2d 716, 725 (1978).

[23] *Video International Productions, Inc.*, (Cable Television Bureau, May 12, 1981); *Cable Dallas, Inc.*, (Cable Television Bureau, May 18, 1982), *review denied*, 93 FCC 2d 20 (1983).

[24] The applicant (Cable Dallas) was seeking a cable television relay service (CARS) authorization. To be eligible for a CARS radio license, it was required to own or manage and operate a cable television system. *See* 47 C.F.R. Section 78.13.

[25] *Video International Productions, Inc., supra* at 2 (emphasis added).

[26] *Cable Dallas, Inc.*, 93 FCC 2d 20 (1983).

[27] *See Ortho - O - Vision, Inc.*, 69 FCC 2d 657 (1978), *recon. denied*, 82 FCC 2d 178, 183 (1980), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 669 F. 2d 58 (2nd Cir. 1982). *See also Earth Satellite Communications, Inc.*, 95 FCC 2d 1223 (1983), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F. 2d 804 (D.C. Cir. 1984).

[28] 82 FCC 2d at 183.

[29] 95 FCC 2d 1223, n. 3 (1983), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F. 2d 804 (D.C. Cir. 1984).

[30] Although there are no decisions expressly addressing the status of MATV or SMATV buildings connected by infrared transmissions, we have no reason to conclude that the result would be any different in those circumstances. The Commission's decisions do not suggest that the mere use of wire or cable within SMATV or MATV equipped buildings would be sufficient to qualify systems as "cable" systems if the internally wired buildings were connected by some types of radio facilites (*e.g.* infrared) but not others (MDS or satellites).

[31] The House Report's undertstanding that SMATV systems would not be cable systems "unless such . . . facilities use a public right-of-way" is consistent with these principles, since cable's use of rights-of-way only occurs when cable is used outside a building's premises. H.R. Rep. No. 98-834, 98th Cong., 2d Sess. 44 (1984).

[32] In addition, single-building systems fall squarely within the Cable Act's exemption for private cable systems since they only serve subscribers in a single multiple unit dwelling that is under

common control, ownership, or management. The Senate Report on the Senate version of the Act, which contained an identical exemption, stated that it was designed to cover "the so-called private cable systems, or master antenna television (MATV) or satellite master antenna television (SMATV) systems." S. Rep. No. 98-67, 98th Cong., 1st Sess. 18-19 (1983). The clear distinction between MATV/SMATV systems and cable systems also is reinforced by the separate reference to SMATV systems as distinct from cable systems in the equal employment opportunity provisions of the Act. See Section 634(h)(1)("For purposes of this section, the term 'cable operator' includes any operator of any satellite master antenna television system ....").

[33] Whether a SMATV or MATV building serves a "multiple unit dwelling" for purposes of the private cable exemption has been fully discussed in prior Commission decisions. *See First Report and Order in Docket 00561*, 63 FCC 2d 956 (1977) and cases cited therein.

[34] Thus, we initially stated that "[w]ith regard to the exclusion of facilities serving multiple unit dwellings, we will include as cable systems only such facilities that use public rights-of-way." *Cable Communications Act Rules*, 50 Fed. Reg. 18637, 58 RR 2d 1, 11 (1985). On reconsideration, we further stated that "[w]hen multiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not ownership, control or management." *Cable Communications Act Rules (Reconsideration)*, 104 FCC 2d at 396-97 (1986).

[35] *City of Fargo v. Prime Time Entertainment, Inc. slip op.* at 9.

[36] 4 FCC Rcd at 2088.

[37] These included Spectradyne, National Satellite Programming Network et al., American Tele/Lease, PrimeTime 24, Pellegrin & Levine, Pacific West Cable, and Preferred Communications.

[38] H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 44 (1984) (emphasis added).

[39] Kungys v. U.S., 108 S. Ct. 1537, 1550 (1988) (opinion of Scalia, J.).

[40] *See ACLU v. FCC*, 823 F. 2d 1534, 1568-1569 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988).

[41] *First Report and Order in Docket* Nos. 14895 and 14233, 38 FCC 683 (1965).

[42] This interpretation is also consistent with the Commission's preemption decisions prior to the Cable Act, in which the Commission made clear that state regulation of facilities defined by the Commission as cable systems had not been preempted. For this reason and the reasons stated above, we reject Prime Time 24's proposal that we interpret the SMATV exception to exclude from the cable system definition any video distribution service operating exclusively on private property. *See also Massachusetts Community Antenna Television Commission*, 2 FCC Rcd 7321 (1987).

[43] 4 FCC Rcd at 2088. In light of our conclusion above that infrared, point-to-point microwave, and other radio transmission systems do not constitute "closed transmission paths," we recognize that the consequence of whether such transmissions involve right-of-way use issue is much reduced. Nevertheless, because right-of-way use has constituted an important jurisdictional boundary, *e.g.* Section 621(e) of the Act, we believe the matter continues to warrant discussion.

[44] 749 F. 2d 804, 810 (D.C. Cir. 1984). As the Mass Media Bureau explained in *Channel One, Inc.* (letter dated February 25, 1986), the premise that the line-of-sight paths required by infrared and other radio transmission burden and thus use public rights-of-way is "unfounded" because

> [t]he location of the line of sight communications link is selected at the operator's risk, and the community is generally under no obligation to accommodate that selection by forbearing from the installation of potential obstructions that would have been installed irrespective of the communications link.

[45] H.R. Rep. 98-934, 98th Cong., 2d Sess. 63 (1984).

[46] 69 FCC 2d 178 (1980); *recon. denied*, 82 FCC 2d 178 (1980).

[47] 95 FCC 2d 1223 (1983).

[48] *See generally New York State Commission on Cable Television v. FCC*, 749 F. 2d at 808-11.

[49] *Notice of Inquiry and Notice of Proposed Rule Making in CC Docket* 87-266, 3 FCC Rcd 5849, 5863-64 (1988).

[50] Section 76.5(ee) (emphasis added).

[51] Nor are they cable systems if closed transmission paths are used but no right-of-way is involved and the buildings are commonly owned, controlled or managed.

[52] Signal leackage from such operations, it should be noted, is not unregulated. It is, however, covered by Part 15 (radio frequency devices) rather than by Part 76 (cable television) of the rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-560

In re Applications of

SIMLA B. ELLIS d/b/a SIMLA BROADCASTING — File No. BPH-861125MK

For Construction Permit for a New FM Station on Channel 294A in Rayne, Louisiana

Appearances

John A. Borsari, Esq. on behalf of Simla Broadcasting; *Charles E. Dziedzic, Esq.* and *Jerry M. Hermele, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: December 11, 1990; Released: December 21, 1990

PRELIMINARY STATEMENT

1. This is a ruling on a Motion For Summary Decision that was filed on November 16, 1990, by Simla B. Ellis d/b/a Simla Broadcasting ("Simla"). On December 3, 1990, the Mass Media Bureau ("Bureau") filed Comments In Support Of Motion For Summary Decision. The issue is now joined for decision. 47 C.F.R. §1.251.

2. This case was initially decided by the Presiding Judge on August 16, 1989. *Rayne Broadcasting Co., Inc.*, 4 F.C.C. Rcd 6552 (Admin. L. J. 1989) (" *ID* "). At that time there were two applicants: Simla and Rayne Broadcasting Company, Inc. ("RBC"). RBC was awarded the grant. The Presiding Judge had awarded no integration credit to Simla because he found that her husband Charles was in control of the application. The Presiding Judge had denied an interlocutory request by Simla to add a real party-in-interest issue against RBC. *See Memorandum Opinion and Order*, FCC 88M-4354, released December 22, 1988. The Review Board held that real party-in-interest issues should be added and tried against both parties and the case was remanded to the Presiding Judge on June 6, 1990. *See Rayne Broadcasting Company*, 5 F.C.C. Rcd 3350 (Review Bd 1990).

3. A Prehearing Conference was set for June 15, 1990, and an initial hearing date was set for July 10, 1990. *See Order* FCC 90M-1643, released June 13, 1990. The trial date was changed at the Prehearing Conference to permit discovery by interrogatories and by motion for documents. *See Order* FCC 90M-1772, released June 21, 1990. Thereafter, discovery was suspended to consider settlement. *See Order* FCC 90M-2142, released July 19, 1990.

4. A second Prehearing Conference was set for September 13, 1990 (FCC 90M-2513), and action on a proferred settlement was deferred pending delivery of a corporate resolution for RBC (FCC 90M-2723). A Motion For Production Of Documents filed by the Bureau was granted (FCC 90M-2726) and final procedural dates and a trial date for December 19, 1990 were set (FCC 90M-3010). Procedural and trial dates were cancelled to permit this summary decision (FCC 90M-3928). RBC's application was dismissed on October 5, 1990, for a failure to prosecute.[1] *See Order* FCC 90M-3186, released October 9, 1990.

5. The Review Board added the following issue against Simla:

> To determine whether Charles Ellis is a real-party-in-interest in the application of Simla B. Ellis d/b/a Simla Broadcasting and the effect thereof on the qualifications of that applicant to be a Commission licensee.

5 F.C.C. Rcd at 3353. With issues added against RBC[2] now moot as a result of its dismissal, only the real-party-in-interest issue against Simla will be resolved in this decision.

FINDINGS OF FACT

Fact Issues and Related Evidence

6. The Review Board relied on findings of the Presiding Judge, which were found to disqualify Simla from receiving any integration credit, as the grounds for adding the remanded issue: First, the funds for construction and operation were in a joint bank account and most of the monies in that account were proceeds from the sale of Station KJJB(FM) at Eunice, LA owned by Charles Ellis. Second, Charles, Simla's husband, is a broadcast engineer who had performed all the engineering in connection with Simla's application up until its filing in 1987, and the scope of the work extended to securing a transmitter site. Third, Charles was found to have participated in settlement negotiations on an equal basis. Fourth, Charles had for one month managed and supervised Simla's former Station KFXZ(FM) at Maurice, Louisiana. Fifth, Charles had failed to divest his community property interest in the Rayne application, an omission also made with respect to the Maurice station. *See ID* at Paras. 32-36.

7. These substantial issues of fact have been addressed by Simla in reliable evidence presented by: Charles Ellis' donation *inter vivos* dated November 14, 1990 (Exh. 1); Declaration of Donald Ledoux dated November 14, 1990 (Exh. 2); Declaration of Cora Johnson dated November 14, 1990 (Exh. 3); Declaration of Janelle Chargois dated November 15, 1990 (Exh. 4); Declaration of Charles Ellis dated November 16, 1990 (Exh.5); Bank Signature Cards of Simla Ellis for Maurice Broadcasting (Exh. 6); Ellis Engineering Billing Time Sheets (Exh. 7); Declaration of Simla B. Ellis dated November 16, 1990 (Exh. 8); Declaration of Walter T. Cart dated November 14, 1990 (Exh. 9); and Letter dated September 21, 1988, from Simla B. Ellis to John A Borsari (Exh. 10). The declarations are based on personal knowledge, set forth facts that would

otherwise be admissible in evidence, and show the competence of the declarant to testify to the matters asserted as facts. *See* 47 C.F.R. §1.251(c).

8. The Presiding Judge analyzes the evidence delineated above recognizing that Simla Ellis is an experienced broadcaster with an established track record. She is not a spousal stalking-horse for Charles Ellis or a passive tag-along on the Rayne application. *Compare Perry Television, Inc.*, 5 F.C.C. Rcd 1667 (Review Bd 1990) and *Pleasure Island Broadcasting, Inc.*, FCC 90D-46 (Admin L. J.), released December 7, 1990. Simla Ellis constructed and operated radio station KFXZ in Maurice, Louisiana and the Presiding Judge has made that finding. *See ID* at Para. 40. She is not now nor was she previously a suspected front for the Rayne application.

De Jure Control Cured by Inter Vivos Transfer

9. One concern raised by the former findings is the community property law of Louisiana which gives Charles Ellis a *de jure* 50% spousal interest in the station. *See ID* at Paras. 36, 51. Simla has eliminated that indicia of control through the *inter vivos* grant by Charles to Simla of Charles' entire community share in the Rayne application. (Exh. 1.) That divestment of control is consistent with an earlier *inter vivos* grant to Simla of Charles' interest in KFXZ(FM), which Simla controlled, and a corresponding *inter vivos* grant of her community interest in KJJB(FM), a station which Charles controlled. (Simla Hearing Exh. 9.) With that *de jure* issue resolved, the determination now remains as to whether Charles Ellis controlled or will control the application and/or the Rayne station as a matter of fact.

Simla's Broadcast Track Record

10. Simla Ellis was a serious candidate for the management of a broadcast station in Rayne. She had enrolled at a state university and took business courses and she volunteered to work at the school's broadcast station. She became involved in local civic groups, including the Maurice Jaycees when it began to accept women members in 1984. (Simla Hearing Exh. 3.) Simla has offered proof that she will involve the station in local issues and she will move forward on an EEO hiring program.[3]

11. While Charles was of assistance in his wife's KFXZ venture, his participation was technical and not managerial. His activities involved the mechanical installation and maintenance of a computerized logging system. (Simla Hearing Exh. 9.) But Simla had independently constructed and operated KFXZ as majority owner and general manager. Simla Ellis believed that she was capable of transferring her experience gained at KFXZ to make the venture at Rayne a successful one and Charles entrusted to her the use of family funds for that purpose. (*Id.*)

12. Charles did assist Simla in preparing the engineering portion of the Rayne application, a logical spousal assist in view of his expertise in broadcast engineering. In fact, Charles admits that he assisted her with any engineering/technical questions. (Simla Hearing Exh. 9 at 3.) Simla first looked at transmitter sites but Charles checked each site for the proper engineering fit and he spoke with landowners to explain the intended use. (*Id.*) Charles also expects that he would be asked by Simla to install a computer system designed for his software package at the Rayne station. (*Id.*)

Failure of the KFXZ Venture

13. The evidence has consistently shown that the reason why Simla Ellis divested herself of Station KFXZ in Maurice was a falling-out on policy with her co-venturer which was so agregious that they were not even on speaking terms when Simla sold her interest. Simla had applied for the Maurice allocation in 1982, and she won the license through a settlement. Simla owned 51% of the station until 1986 when she sold out to the 49% shareholder, Sharon Ledoux ("Ledoux"). Ledoux had been brought in at the settlement to assist financially. Simla selected the construction site, oversaw the construction, selected the program format and she selected Drake-Chenault as the provider of the automated programming material. The programming was on computer tape and editing was done to insert commercials and local programming. Charles Ellis provided the editing skills. (Johnson Decl. Exh. 3.)

14. From the facts related by Simla, Ms. Ledoux apparently had some leverage with the bank that had financed the station and Ledoux used her influence to force an early repayment which could not be met with the station's cash flow. Therefore, Simla feels that she was forced to sell her controlling interest in the licensee to Ledoux so that Ledoux could use the sale proceeds to offset losses in another unrelated venture. (Simla Ellis Decl. Exh. 8.) The evidence is sufficient to conclude that Simla did not voluntarily abandon Station KFXZ. When the relationship between Simla and Ms. Ledoux deteriorated, Charles assisted at the radio station in a caretaker role to insure that KFXZ stayed on-the-air while the station was being sold. (Charles Ellis Decl. Exh. 5.) But Charles Ellis did not manage the station or engage in the setting of station policy. (Simla Ellis Decl. Exh. 8.)

Evidence of Charles Ellis' Control

15. Both Simla and Charles Ellis deny that Charles exercised control or influence over the operations of Station KFXZ. (Charles Ellis Decl. Exh. 5 and Simla Ellis Decl. Exh. 8.) Those self-serving conclusions are to be accepted only after corroboration.

16. Donald Ledoux (no relation to Sharon) was interviewed and hired by Simla as the KFXZ program manager. He worked at the station from July 1985 to December 1986. Charles Ellis was not a part of management. She reviewed programming daily to assure it was consistent with the computerized format and her approval was required in advance for any deviation. Ledoux states:

> When Mr. Ellis was at the radio station, he attended to engineering and technical projects. He was not involved in programming decisions, and to my knowledge he did not have any input into the operation of the radio station except to maintain the station's computer automation equipment.

(D. Ledoux Decl. Exh. 2.)

17. Cora Johnson was employed as office manager at Station KFXZ from June 1985 to December 1986. Ms. Johnson reported daily to Simla Ellis on program logs, input data for the computer system, scheduling and cancelling commercials, routine bank deposits and withdrawals. Telephone inquiries were always directed to Simla Ellis. Ms. Johnson was the office secretary and from her vantage point as such she concludes that Simla Ellis

operated the station as its general manager and her husband was only involved in engineering matters and technical assistance with the station's computer program. (Johnson Decl. Exh. 3.)

18. Janelle Chargois ("Chargois") was a member of a local development board that was involved in fund raising for a local school. Simla Ellis joined the board and worked with Ms. Chargois in Maurice on a week-long broadcast fundraising effort at Station KFXZ. All the time that Ms. Chargois was at the station she found Ms. Ellis to be in charge of operations. She had no business dealings with Charles Ellis and she only saw Charles on social occasions outside the station. (Chargois Decl. Exh. 4.)

19. The funds in the Ellis' joint account were primarily traceable to the proceeds of the sale of Charles Ellis' Station KJJB in 1984. But the sale of Station KFXZ in late 1986 reduced Simla's indebtedness by the sum of $138,000 thus improving the Ellis' joint liquidity to enable Simla to undertake Rayne. (Motion For Summary Decision at 20-21.) There is evidence in the record showing that Charles Ellis was not a signatory to the KFXZ checking account. (Exh. 6.) Simla was sole signatory on that checking account and therefore exercised control over station funds independent of Charles. She is likely to independently expend funds for Rayne. Therefore, it is found that while joint funds were used to finance the Rayne venture, there is no basis to conclude that Charles Ellis would not make funds available as needed, at least until the station's income meets station expenses.

20. It was found that Charles Ellis had assisted Simla in the selection and obtaining of a transmitter site including preparation of a lease. (*ID* at Para. 32.) The participation of Charles is further explained by the record. First, he did not contact any proposed site owner by himself or exchange correspondence with an owner. (Ch. Ellis, Tr. 841-42.) Second, Simla Ellis did examine other sites without the presence or assistance of her husband. (Ch. Ellis, Tr. 949.) Charles provided Simla with the same form lease that he used for all clients. He also prepared a map in which he outlined a permissible site area. (Ch. Ellis, Tr. 840-43.) Charles Ellis kept an account of his services for the Rayne project which totalled $9,945.

21. Charles Ellis was found to have played a substantial role in negotiating with principals of RBC (*Id.* at Paras. 34-35). But the one time that he negotiated with RBC he was asked by Mr. Basso to join in a telephone conversation. And there is independent evidence that in negotiations with applicant Cart, discussions were directly with Simla Ellis. Mr. Cart did speak by telephone with Charles Ellis in November 1988 when Simla Ellis was out of the country visiting her sick father. On that occasion, Charles Ellis was merely given a message by Cart to transmit to Simla on her return. There was nothing said in several meetings between the Ellises and the Carts that led Walter Cart to conclude that Simla Ellis would not independently control the fate of her application and/or operate the Rayne station. (Cart Decl. Exh. 9.)

Summary of Simla's Role in Rayne

22. As evidenced by her actions in Maurice, Simla intends to own a broadcast station in Rayne. She independently retained counsel who has never represented her husband and she used an independent engineer to prepare an exhibit that was used at trial. Simla intends to pay Charles for the engineering assistance in the application and he has kept time sheets recording the value of his services. Charles assisted in securing a site but he never proceeded with selection without consulting Simla. Simla sent the application to counsel in Washington, D.C., she arranged for local publication, and she established the local public inspection file. She participated actively in settlement negotiations and never lost the lead to her husband Charles. She controlled, through her counsel, the ultimate site selection and an engineering amendment that was filed while she was attending her sick father in the Fiji Islands. (Simla Ellis Decl. Exh. 8.)

CONCLUSIONS OF LAW

23. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion - - - must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, Simla has the burden of establishing that summary decision would be appropriate based on her papers. *Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). It is significant where, as here, the parties are not in disagreement over material factual inferences that may be drawn from the factual findings. *Big Country Radio, Inc.*, 50 F.C.C. 2d 967 (Review Bd 1975). The Bureau concurs with the facts alleged and conclusions argued by Simla. Therefore, for reasons stated below and on the record provided here, the motion will be granted as a matter of law.

No Sham or Passive Role Shown

24. Simla filed her application as a sole proprietor. Thus, there are no limited partners or non-voting stockholders to whom Simla could "give away the store," *Metroplex Communications, Inc.*, 5 F.C.C. Rcd 5610, 5612 (Comm'n 1990), or whose roles must be analyzed for attribution. Without the added remand issue of real-party-in-interest, Simla was found to be basically qualified to receive a grant. But because of the funding and services that Simla's husband Charles was found to have contributed, there was no integration credit awarded to Simla at the trial level. *See ID* at Paras. 52- 53. *Compare N. E. O. Broadcasting Company*, 103 F.C.C. 2d 1031, 1035 (Review Bd 1986) (where non-owner husband was found to control 100% owner wife in all decisions regarding application the applicant received no integration credit but was not declared unqualified). The facts do not support the conclusion that there was a "sham" arrangement, *Carta Corporation*, 5 F.C.C. Rcd 3696 (Review Bd 1990), or that Simla was a passive sole proprietor who was fronting for her husband, *Perry Television, Inc.*, 5 F.C.C. Rcd 1667, 1668-69 (Review Bd 1990) (spouses found to be fronting for husband attorneys who had promoted the application and controlled all aspects of its prosecution). *See also Edward Royce Stoltz, II, et al.*, Comm'n *Slip Op.* FCC 90-390, released November 27, 1990 (husband limited partner was dominant principal and wife general partner was passive to point that no credit was given to claim that she would wield management authority).

25. Rather, the evidence here shows that sole-proprietor Simla Ellis, an experienced broadcaster who has had recent hands on experience in constructing and operating an FM broadcast station, lost her station in Maurice because of conflicting business priorities of a partner. Simla wanted to return to broadcasting with the opportunity that became available in Rayne. Her assertions of independent control are corroborated by disinterested witnesses who testified to the fact that she ran the day-to-day operations of Station KFXZ for one year and that she did not rely on her husband for anything beyond technical assistance. The evidence indicates that he intends to act in essentially the same manner in Rayne. She has a proven track record to show that she can construct, operate and manage the station. While such evidence may be given a lesser qualitative weight on a comparative assessment, here the evidence is substantial proof that Simla Ellis is not a front for her husband Charles because she has shown that she can manage alone.

Spousal Relationship and Financial Assistance Not Dispositive

26. It has been recognized that a spousal relationship is viewed differently because families are expected to assist and cooperate in a business venture, particularly in assisting with financing. *High Sierra Broadcasting Co., Inc.*, 96 F.C.C. 2d 423, 435 (Review Bd 1983) (trial judge correctly refused to add real-party-in-interest issue because Commission recognizes that even independent family relations have such attributes as financial ties which would be persuasive evidence of real-party-in-interest in a non-family relationship). The Bureau concurs that the use of joint funds to prosecute, construct and operate the Rayne station does not require a finding that Charles will have an interest. (Comments at 5.) Where Charles Ellis did no more than assist on technical engineering matters, assist with a transmitter site and negotiations, and allow joint family funds to be used, Simla's proposal should not be disqualified under the Review Board's remand issue. *Compare Dorothy J. Owens*, 5 F.C.C. Rcd , Comm'n *Slip Op.* FCC 90-298, released November 8, 1990 (Comm'n authorized an assignment from sister to brother of a station that sister had constructed and operated for four months). The evidence does not support a conclusion of a sham or passive principal on Simla's part, and the award of the license of Simla would not violate Commission policy.

Control Not Shown to Pass from Simla to Charles

27. The standard for determining *de facto* control, applied on a case-by-case basis, *Turner Broadcasting System, Inc.*, 101 F.C.C. 2d 843, 848 (Comm'n 1985), is whether the facts demonstrate that there was vested in another person or entity the means of operating a station and setting policy. *WHDH, Inc.*, 17 F.C.C. 2d 856, 863 (Comm'n 1969). In making such an assessment, the Commission focuses on control of finances, programming and personnel. *Dorothy J. Owens, supra* at Para. 11.

28. The testimony at trial discloses that as a result of the sale of Charles Ellis' Station KJJB in 1984, the Ellis joint bank account received a substantial infusion of cash. (Ch. Ellis, Tr. 866-68.) Simla Ellis also relies on the liquidating of her debt on the Maurice property as adding to the family's net assets. (*See* Motion For Summary Decision at 20-21.) But there is no analysis made of how that release of an indebtedness would lessen the demand on the cash in the joint account to meet Rayne's expenses. The only conclusion that can be reached is that the Rayne venture was substantially funded by Charles. But the use of joint funds for prosecuting the application and constructing the proposed station is not by itself determinative. *Jerome Thomas Lamprecht*, 99 F.C.C. 2d 1219, 1224 (Review Bd 1984), *rev. denied*, 3 F.C.C. Rcd 2527 (Comm'n 1988), cited in *Richard P. Bott, II*, 4 F.C.C. Rcd 4924, 4929 (Review Bd 1989). Rather, the totality of the actions of Charles Ellis on behalf of Simla Ellis must be considered. *Perry Television, Inc., supra.*

Charles Ellis' Assistance was Non - Managerial

29. Charles Ellis assisted in preparing the engineering portion of the application, he visited a site and a site owner in Simla's absence, and he once participated in negotiations at the request of Lou Basso, father of one of the principals of RBC. He also was present at negotiations with Cart. But the declaration of Walter Cart shows that Simla Ellis controlled the negotiations. While Charles Ellis became involved with negotiations, the evidence does not establish that he excluded Simla from the process, his active participation was only for one phone call at the request of Basso, and Cart has shown how Simla handled the overall negotiations. No managerial or policy implications flow from Charles Ellis' role in negotiations. The engineering assistance was technical in nature and had no relevance to policy. The assistance provided for obtaining the site was on only one occasion when Simla was out of the country. Simla Ellis gave general direction and did at least as much work as Charles in locating and securing a site. Charles did not negotiate or sign any written instrument. Nor was there any managerial or policy decision made by Charles Ellis in connection with the site. This evidence, in its totality, negates any participation by Charles Ellis in management or policy decisions.

30. For her part, Simla Ellis prepared her Form 301, aside from the engineering section. She hired communications counsel who had done no work for Charles, who was paid only by Simla, and who counseled and communicated only with Simla. There was no occasion to hire other personnel since Charles was the project's engineer. But Simla had done the hiring for Station KFXZ and that evidence is probative here to conclude that she knows how to staff a station and that she would independently hire the staff for Rayne. This evidence, in its totality, negates any participation by Charles Ellis in the selection of station personnel.

31. The evidence considered in this case fails to establish that Charles Ellis controlled the sole-proprietor application of Simla Ellis and there is positive evidence that is sufficient to establish that Simla Ellis prepared, controlled and directed the prosecution of her application without any undue influence arising from the assistance she received from her husband Charles. *Compare Colonial Communications, Inc.*, 5 F.C.C. Rcd 1967, 1969 (Review Bd 1990) (Review Board awarded 100% integration credit to proposed general manager with prior non-broadcasting business track record even though she intended to rely on spouse to fill in on other business and even though she was assisted by a friend in broadcasting with the preparation of her application).

ORDER

Accordingly, IT IS ORDERED that the unopposed Motion For Summary Decision filed by Simla B. Ellis d/b/a Simla Broadcasting IS GRANTED and the remanded real-party-in-interest issue IS RESOLVED in favor of the applicant.

IT IS FURTHER ORDERED that the application of Simla B. Ellis d/b/a Simla Broadcasting, Inc. (File No. BPH-861125MK) for a construction permit for a new FM Station on Channel 294A in Rayne, Louisiana IS GRANTED.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] RBC could not produce a corporate resolution authorizing its dismissal pursuant to settlement. There were two principals: Melinda Lizotte and Wendel Byers, each a 50% voting shareholder. Byers withheld his authorization to settle. At a prehearing conference held on July 20, 1990, RBC's counsel announced his withdrawal. RBC was granted time to obtain new counsel and was ordered to file a status report by September 28, 1990, showing that it was preparing for trial and showing cause why its application should not be dismissed for a failure to prosecute. *See Order* FCC 90M-3011, released September 24, 1990. RBC failed to comply and its application was dismissed.

[2] In addition to the remanded real-party-in-interest issue, the Presiding Judge had added *sua sponte* a misrepresentation or lack of candor issue based on the hearing testimony of Wendell Byers. *See Order* FCC 90M-1643, released June 13, 1990.

[3] Simla asks that trial rulings on the relevance of qualitative evidence be revisited here. But the issue set by the Review Board is a basic qualification issue that does not require a close analysis of rejected qualitative comparative evidence. But the relevant conclusions drawn from such evidence in its totality, i.e., that Simla Ellis is serious about being actively involved in managing and operating an FM station in Rayne, is supported by the rejected evidence in Simla Hearing Exh. 3, and that evidentiary conclusion will be noticed here.

[4] This *Summary Decision* disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-474

In re Applications of

ADVANCED BROADCAST TECHNOLOGIES, INC. — File No. BPH-870915MC

Board of Trustees of the PENNSYLVANIA STATE UNIVERSITY — File No. BPED-870916MD

For a Construction Permit for a New FM Station on Channel 233A at State College, Pennsylvania

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 1990; Released: November 16, 1990

By the Commission:

1. The Commission has before it for consideration, a Review Board Decision, *Advanced Broadcast Technologies, Inc.*, 5 FCC Rcd 1960 (1990); an Application for Review filed May 2, 1990 by Pennsylvania State University; and an Opposition filed May 16, 1990.

2. Penn State's Application for Review will be denied. Two arguments raised by Penn State, however, warrant further comment. First Penn State argues that the Board erred in failing to remand the proceeding for hearing on issues concerning the availability of Advanced Broadcast Technologies, Inc.'s proposed transmitter site, and the candor of Advanced's representations concerning that site. Second, Penn State was assessed a demerit under the comparative criterion involving diversification of media ownership, because it is the licensee of station WPSU(FM) in State College; station WPSX(TV) in Clearfield, Pennsylvania; and station WPSE(AM) in Erie, Pennsylvania. Penn State asserts that the assessment of a demerit is inconsistent with the Commission's policy of treating noncommercial stations differently from commercial stations for diversification purposes.[1]

I. SITE AND CANDOR ISSUES

3. Penn State filed a request to enlarge issues with the ALJ alleging that Advanced did not have reasonable assurance of site availability and was lacking in candor as a result of its representations concerning its proposed site. Penn State asserted that Walter Barker, the owner of Advanced's proposed transmitter site, told Lynn Deppen, Advanced's principal, that Advanced could not lease the site. Both the ALJ (*Memorandum Opinion and Order*, FCC 89M-626, released February 29, 1989) and the Board (5 FCC Rcd at 1960-63 ¶¶ 4-18) found that Penn State failed to raise substantial and material questions of fact concerning Advanced's candor and the reasonable assurance of availability of its proposed transmitter site. Penn State argues that the Commission must hold a hearing to resolve the discrepancies between Barker's and Deppen's versions of their negotiations.

4. Deppen asserted that he called Barker before Advanced's application was filed on September 15, 1987. Deppen's version of the conversation is confirmed by his very detailed contemporaneous notes. These notes indicate that Barker agreed to lease tower space, that Barker and Deppen specifically discussed terms for a lease, and that Barker told Deppen to write him a letter confirming their conversation. On July 30, 1987 Deppen wrote Barker a letter confirming their conversation. On September 29, 1987, after Deppen filed Advanced's application, he called Barker about the site. Deppen's contemporaneous notes of that conversation indicate that Barker assured him that he could lease the site at a rental of between $450 and $855 a month. On November 23, 1987, Deppen sent Barker a proposed option and a check for $100 to secure that option. In response, Barker sent Deppen a note dated November 30, 1987, offering Advanced an option to lease the site at $550 a month, and asking for a non-refundable option fee of $1500 and for advance payment of the first and last month's rent. At that point, Advanced amended its application to specify a new site.

5. Penn State's request for issues is premised entirely on an affidavit from Barker submitted in support of its request for site and candor issues. Barker acknowledged the initial call from Deppen, but failed to describe what he told Deppen in that call or otherwise rebut Deppen's contention that Barker initially agreed to offer Advanced a lease. Barker also does not specifically contend that he told Deppen the site would not be available before Advanced filed its application. Instead, Barker equivocally alleges only that "either just before or just after Advanced filed its application" he told Deppen that Advanced would not be able to lease his tower. Moreover, other than for Barker's equivocal statement about when he notified Advanced, his affidavit does not contain any information inconsistent with Deppen's notes and the contemporaneous description of their post filing negotiations. In fact, two months after Advanced filed its application, Barker offered Advanced an option for a lease at $550 a month, which is consistent with Deppen's version of the negotiations. In the face of the evidence supporting Deppen's assertions that Barker initially agreed to lease the site and that Barker continued to engage in negotiations about such a lease for two months after Advanced's application was filed, and the absence of any directly contradictory evidence from Barker relevant to these points, Penn State has not raised a substantial and material question of fact warranting the designation of site availability and candor issues against Advanced.

II. DIVERSIFICATION OF OWNERSHIP

6. Penn State argues that because the multiple ownership rules were amended in 1984 to exempt noncommercial FM and TV stations, its non-commercial broadcast interests should not be counted against it for

diversification purposes. 47 CFR § 73.3555(f). Penn State asserts that the precedents relied on by the Board, *San Joaquin TV Improvement Corp.*, 96 FCC 2d 617, 620-21 (Rev. Bd. 1984) and *Talleyrand Broadcasting*, 103 FCC 2d 476, 478 (Rev. Bd. 1985), were adopted before the modification of Section 73.3555.[2] Those arguments are without merit. The exemption from the multiple ownership rules, cited by Penn State, preceded the *Talleyrand* and *San Joaquin TV* decisions. The exemption was formerly contained in 47 C.F.R. § 73.240(b) (FM) and 47 C.F.R. § 73.636(b) (TV), which were deleted when the Commission adopted Section 73.3555(f). *Talleyrand* and *San Joaquin* establish that noncommercial applicants for commercial allocations are subject to the same comparative criteria as commercial applicants. Assessing a demerit under the circumstances of this case will further the overall objectives of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). [3]

7. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed May 2, 1990 by Pennsylvania State University, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Board recently certified to the Commission a question concerning whether diversification should be considered as a comparative factor in proceedings for noncommercial channels. *Real Life Educational Foundation of Baton Rouge, Inc.*, 5 FCC Rcd 3420 (1990). Our determination here is limited to consideration of applications seeking authorization of commercial frequencies, and it is not intended to prejudge the questions raised by the Board's certification.

[2] Those cases hold that ownership of noncommercial stations have a somewhat lesser diversification importance than ownership of commercial stations. *Talleyr and Broadcasting, supra* at 478.

[3] Even if we were to accept Penn State's argument, Advanced would still prevail because of its advantage under the integration of ownership into management criterion.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-540

In re Applications of

CSJ INVESTMENTS, INC.	File No. BPH-870615MK
David H. Smith, Maureen L. Smith, James E. Spisiak, Patricia B. Spisiak d/b/a KEYS BROADCASTING SYSTEM	File No. BPH-870615MW
SOUTH STAR COMMUNICATIONS, INC.	File No. BPH-870615ND
KEY WEST BROADCASTING COMPANY	File No. BPH-870615NE

For Construction Permit for a
New FM Station on Channel 300C1
in Key West, Florida

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 1990; Released: November 16, 1990

By the Commission:

1. Before us for consideration are an Application for Review filed April 26, 1990, by Key West Broadcasting Company (Key West) and Oppositions thereto filed May 11, 1990, by CSJ Investments, Inc. and Keys Broadcasting System.

BACKGROUND

2. Pursuant to the hearing designation order (HDO) released in this proceeding on December 20, 1989, the parties were directed to file written notices of appearance by January 9, 1990.[1] *Major-Keene Partnership*, 4 FCC Rcd 8713, 8716 ¶ 27. On that date, Key West filed with the ALJ a request for an extension of time. Key West claimed that it did not receive a copy of the HDO until January 2, because of a mailing delay,[2] and that it was unable to make arrangements to pay the hearing fee in the short amount of time remaining before January 9, because one of the two required signatories (Richard Stahl) on its corporate checking account was out of the country and could not be reached. Key West stated that it would file its notice of appearance and pay the hearing fee on January 19, after Mr. Stahl returned. Accordingly, it sought an extension of time until January 19, within which to file its notice of appearance and pay the hearing fee.

3. The ALJ denied the extension of time request and dismissed Key West's application for failure to prosecute. *Memorandum Opinion and Order*, FCC 90M-184, released January 29, 1990. The ALJ pointed out that Key West's alleged inability to pay the hearing fee did not explain its failure to file a timely notice of appearance. Noting that Key West conceded that it received a copy of the HDO on January 2, the ALJ held that it had adequate time to file a notice of appearance and that its failure to do so could not be excused. The ALJ concluded that, if Key West intended to appear and participate in the hearing, it should have filed its notice of appearance along with a request for deferral of the hearing fee, as is required by 47 C.F.R. § 1.221(g). [3] The ALJ also held that Key West had not shown good cause for paying the hearing fee late, and that it had not shown that late payment of the hearing fee would serve the public interest. Finally, because Key West did not file its notice of appearance and pay the hearing fee on January 19 as promised, the ALJ further held that this circumstance provided a separate and independent ground for denying the extension of time request and dismissing the application for failure to prosecute.

4. Key West appealed the ALJ's action to the Review Board. The Board dismissed the appeal, holding that it had no authority to rule on fee deferral requests, inasmuch as such matters are acted on by the Commission's Managing Director (with the concurrence of the General Counsel), pursuant to 47 C.F.R. §§ 0.231(c) and 1.1115(c). *Major - Keene Partnership*, 5 FCC Rcd 1903 (1990).

5. In its application for review, Key West contends that the Board's summary dismissal of its appeal not only rendered meaningless Key West's rights under 47 C.F.R. § 1.301(a)(1), which permits an appeal to the Board when the presiding officer's ruling terminates a party's right to participate in the proceeding, but also ignored the fact that the ALJ acted on Key West's fee deferral request, even though he may not have been authorized to do so. Accordingly, Key West urges us to grant its application for review and consider its arguments, which it contends demonstrate that it should be accorded the right to participate in this proceeding and make late payment of its hearing fee.

DISCUSSION

6. We will grant review but sustain the ALJ's dismissal of Key West's application. In view of our action here, we need not decide whether the Board's dismissal of Key West's appeal deprived it of the right to be heard under section 1.301(a)(1). We do, however, agree with the Board that neither it nor the ALJ had authority to rule on Key West's fee deferral request because the Commission's Managing Director (with the concurrence of the General Counsel) has been given delegated authority to act on such matters.[4] For this reason, we believe that the interests of the parties and the agency would have been better served had the Board certified Key West's appeal of the ALJ's denial of its fee deferral request for consideration

by the Commission, which has jurisdiction over actions by all subordinate officials, rather than summarily dismissing it.

7. We now turn to Key West's arguments on the merits. Key West first contends that its extension of time pleading substantially complied with section 1.221(g), because it stated the relief requested (hearing fee deferral) and notified the Commission and all parties concerned of Key West's intent to participate in the hearing. Accordingly, Key West submits that the ALJ's dismissal of its application on the basis that it did not proceed properly under section 1.221(g) elevated form over substance and should therefore be set aside. Key West further contends that its justifications -- the late receipt of the HDO and Mr. Stahl's absence -- for not paying its hearing fee on the deadline established pursuant to the HDO were sufficient, and that the ALJ erred in holding that it had not shown good cause for fee deferral. Because the ALJ had no authority to act on Key West's fee deferral request and because we conclude below (paragraphs 9-11) that the ALJ was justified in dismissing Key West's application for its failure to file its notice of appearance and pay the hearing fee on January 19, as promised in its extension of time request, it is unnecessary to determine whether Key West had substantially complied with Section 1.221(g) or whether the ALJ erred in finding that it had not shown good cause for fee deferral.[5]

8. Key West next contends that the ALJ's dismissal of its application is inconsistent with the Commission's policy of permitting as many qualified applicants as possible to compete in comparative licensing proceedings, thereby ensuring that the best qualified applicant is selected. The Commission, however, now gives greater emphasis to the discretion accorded ALJs in determining appropriate procedures to facilitate the prompt performance of their responsibilities and applicants have a high burden to justify an exception to the procedural deadlines uniformly applied by the ALJ to all applicants in the proceeding. *Cuban - American Limited*, 5 FCC Rcd 3781 ¶ 5 (1990). *See also Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 ¶¶ 2 and 3 (1986), where the Commission stated that it has the responsibility to provide new services to the public in the most efficient, expeditious manner possible, and that the effective and expeditious dispatch of the Commission's business is, in itself, an integral part of the public interest, and *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134 n.7 (1985), where the Commission concluded that its former policy of temporizing its application dismissal determinations had often disserved the public interest by inordinately delaying new service to the public.

9. Finally, Key West contends that it acted reasonably in not paying its hearing fee on January 19, in view of the circumstances then prevailing; *i.e.*, because the ALJ had not acted on its extension of time request, it was uncertain as to its status in the proceeding and therefore reluctant to pay the hearing fee. Whether or not Key West believed that it acted reasonably in not paying the hearing fee is not the issue; rather, the issue is whether Key West forfeited its right to remain an applicant in this proceeding by failing to pay the hearing fee and file a timely notice of appearance on the date it promised it would do so. The ALJ concluded that Key West had and, accordingly, dismissed its application. For the reasons that follow, we agree with that determination.

10. In amending our rules to establish the Commission's Fee Program, *Establishment of a Fee Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947 (1987), we determined that payment of the prescribed fee was a pre-condition to the applicant's use of the Commission's regulatory processes (*id.* at 957 ¶ 62); that all fees would be due upon submission of the application or other chargeable filing (*id.* 954 ¶ 40); that the ultimate responsiblity for paying the correct fee in a timely manner remains with the applicant (*id.* at 957 ¶ 65), consistent with the Commission's policy that it is the applicant's sole responsibility to know and comply with the Commission's rules (*id.* at 949 ¶ 15); and that applications would be dismissed outright for failure to pay the fee (*id.* at 957 ¶ 62). Accordingly, 47 C.F.R. §1.1107 provides that each application or other filing for which a fee is prescribed must be accompanied by a remittance in the full amount of the fee due and that applications will be dismissed when applicants fail to pay the prescribed fees by the due date or by a later date established pursuant to a deferral request under 47 C.F.R. § 1.1115(a).

11. Given the above, we believe the ALJ had no choice but to dismiss the application in view of Key West's failure to pay the hearing fee on January 19, as it promised; indeed, to have held otherwise would have been clear abuse of discretion. A similar result was likewise required in light of Key West's failure to file its notice of appearance on January 19. In this regard, 47 C.F.R. § 1.221(c) provides that applications will be dismissed for failure to prosecute when applicants fail to file timely their written notices of appearance. *Silver Springs Communications*, 3 FCC Rcd 5049 (Rev. Bd. 1988), rev. den., 4 FCC Rcd 4917 (1989).

12. One further matter warrants brief comment. Key West seems to suggest that its application should not be dismissed because it was prosecuting the application without assistance of counsel. We disagree. The Commission has held that, where an applicant elects to act without counsel, it has the burden of becoming acquainted with and conforming to the Commission's rules and procedures. *Silver Beehive Telephone Co.*, 34 FCC 2d 738, 739-40 ¶ 7 (1972). In this same vein, the Commission further stated that it will neither excuse nor tolerate the disruption of its processes because an applicant, which undertakes to act as its own counsel, is unfamiliar with the Commission's rules and procedures. *Id.*

13. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed April 26, 1990, by Key West Broadcasting Company IS GRANTED to the extent indicated herein and IS DENIED in all other respects, and the Review Board's Memorandum Opinion and Order, 5 FCC Rcd 1903 (1990) IS SET ASIDE.

14. IT IS FURTHER ORDERED, That the ALJ's *Memorandum Opinion and Order*, FCC 90M-184, released January 29, 1990 IS AFFIRMED to the extent that he dismissed Key West's application for failure to file a notice of appearance and pay the required fee on January 19, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 C.F.R. § 1.221(f) provides that the hearing fee must accompany each written notice of appearance at the time it is filed.

[2] Key West submitted a copy of the envelope in which it claimed the designation order was sent. The envelope bears a St. Paul, Minnesota post-mark, dated December 28, 1990, even though it is addressed to Blowing Rock, North Carolina, as specified in Key West's application.

[3] Section 1.221(g) provides that a written notice of appearance that is not accompanied by the proper fee, or a request for waiver or deferral of the hearing fee per 47 C.F.R. § 1.1115, shall be dismissed by the fee processing staff. Subsection (a) of the latter rule provides that such requests may be granted upon a showing of good cause and where the waiver or deferral would promote the public interest. Subsection (c) thereof provides that such requests are acted on by the Commission's Managing Director with the concurrence of the General Counsel.

[4] We take this opportunity to emphasize that misdirected pleadings are to be informally referred to the appropriate official who has authority to act on such matters. *See Florida - Georgia Television Co., Inc.*, 12 FCC 2d 332 (1968), where the Commission concluded that adoption of such a procedure for handling misdirected pleadings would result in more expeditious consideration of those pleadings and, thus, serve the parties' interests as well as the Commission's. Thus, where the applicant, such as here, asks the presiding judge for an extension of time on grounds related to the fee requirement, the pleading should be treated as a request for a fee deferral, and it should be referred to the Managing Director for consideration. In any case where the fee is actually paid after the date established for filing notices of appearance, the applicant will be required to pay the hearing fee plus a 25 percent surcharge. *See* 47 C.F.R. § 1.1114(b) and (c).

[5] By the same token, we will assume, without deciding, that Key West provided an adequate basis for extending the original January 9 deadline for payment of the hearing fee and filing a notice of appearance until January 19. *See* note 2, above.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. — File No. BRCT-871221KE

For Renewal of License of
Station WWOR(TV),
Secaucus, New Jersey

and

GARDEN STATE BROADCASTING, Limited Partnership — File No. BPCT-871223KG

For Construction Permit
Secaucus, New Jersey

ORDER

Adopted: November 5, 1990; Released: November 16, 1990

By the Commission:

1. By *Memorandum Opinion and Order*, FCC 89M-2206, released September 6, 1989, the ALJ dismissed the application of Whitely Communications for its failure to attend prehearing conferences and to comply with his document discovery order and for other instances of noncompliance with the Commission's rules. In a decision, *WWOR - TV, Inc.*, 4 FCC Rcd 8127 (Rev. Bd. 1989), the Review Board affirmed the ALJ's dismissal of the application. Whitely then filed an application for review of the Board's decision, which we denied. 5 FCC Rcd 3768 (1990). Now before us are: a Petition for Reconsideration filed July 20, 1990 by Whitely Communications; an Opposition filed July 30, 1990 by the Mass Media Bureau; and an Opposition and a Motion for Acceptance of Opposition filed August 3, 1990 by WWOR-TV, Inc.

2. 47 C.F.R. § 1.106(b)(2) provides that, where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present:

> (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or
>
> (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

3. Whitely has not presented new facts or changed circumstances as required by § 1.106(b)(2). Rather, Whitely's petition simply reargues allegations that were made in its earlier filed application for review. We fully considered those allegations and found them to be without merit when we denied that application for review and affirmed the Board's decision, *supra*. It is well settled that the Commission will not grant reconsideration for the purpose of reviewing matters that it has already considered. *See WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965). In this regard, Whitely's reliance on the ALJ's recent discovery ruling concerning another applicant in this proceeding provides no new material facts which would warrant the granting of its reconsideration request. FCC 90M-1878, released June 29, 1990. In that ruling, the applicant had before the Commission an authorized appeal and a related stay request asking that it not be required to produce documents for which it had asserted privilege claims.[1] Noting this, the ALJ correctly ruled that compliance with his discovery order was therefore a matter to be decided by the Commission. The same was not true with respect to the situation surrounding the ALJ's earlier discovery ruling (FCC 88M-4015, released 23, 1988) ordering Whitely to produce requested documents. Whitely did not have before the Commission an authorized appeal; rather its appeal of the underlying issue enlargement order upon which the ALJ's discovery ruling was based was unauthorized because the ALJ, pursuant to 47 C.F.R. § 1.301(b), had denied Whitely permission to file such an appeal. Moreover, Whitely had not claimed that the financial information it was required to produce was subject to a claim of privilege. In view of the foregoing, the ALJ correctly held that Whitely had no legitimate reason for not complying with his discovery order. The Board fully agreed with that determination (4 FCC Rcd 8127, 8128 ¶ 6), and so did we in denying Whitely's application for review.

4. ACCORDINGLY, IT IS ORDERED, That the Motion for Acceptance of Opposition filed August 3, 1990 by WWOR-TV, Inc. IS GRANTED for good cause shown and the accompanying Opposition to Petition for Reconsideration by WWOR-TV, Inc. IS ACCEPTED.

5. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed July 20, 1990 by Whitely Communications, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] 47 C.F.R. § 1.301(a)(2) provides that, if the presiding officer's ruling requires the production of documents, over objection based on a claim of privilege, the ruling on the claim of privilege is appealable as a matter of right.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-561

In the Matter of

Miscellaneous Amendments	RM-7241
to Part 97 of the Rules Governing	RM-7242
the Amateur Radio Services.	RM-7243
	RM-7244

NOTICE OF PROPOSED RULE MAKING

Adopted: November 5, 1990; Released: November 16, 1990

By the Commission:

I. INTRODUCTION

1. In this *Notice of Proposed Rule Making* (Notice), we propose a series of unrelated amendments in the rules for the Amateur Radio Services (47 C.F.R. Part 97). These amendments, initiated by four petitions for rule making[1] from the amateur service community, include changes in terminology, technical standards, and operating requirements.

II. PETITIONS

2. The petitioners have asked for generally minor rule changes which they believe would make the rules more useful. Some of the requested changes reflect preferred terminology, clarify the application of a rule, or assist in understanding a rule. Other requested changes are repetitious or clearly do not warrant a change in the current rules. The requested rule amendments are discussed below in the order the subject rule appears in Part 97.

III. DISCUSSION

Subpart A -- General Provisions.

3. *Terminology*. The ARRL requests that Section 97.3 of the Commission's Rules, 47 C.F.R. § 97.3, be amended to define several additional terms.[2] We concur with its proposal to define the terms "telecommand," "telemetry," and "space telemetry." The other terms, "tactical call sign," and "digipeater," however, are not used in the rules. Definitions for them, therefore, are inappropriate for codification. As to the ARRL's request that we define the term "emergency communications," we note that this term is part of the phrase "providing emergency communications" in Section 97.1(a) and the heading of Subpart E of the Commission's Rules, 47 C.F.R. Subpart E, entitled "Providing Emergency Communications". This phrase encompasses amateur station operation during a disaster, safety of life and protection of property, stations in distress, and RACES. The general term "emergency communications" describes essential amateur service communications directly related to the immediate safety of life or the immediate protection of property while normal communication systems are unavailable and has no special meaning within the rules. No definition, therefore, is necessary. Additionally, we will retain the word "channel" where it appears because this term recognizes that a transmitted signal occupies a narrow band of frequencies rather than a single frequency. [3] We also propose to delete the reference to frequency drift and Doppler shift in the definition for the term "bandwidth" because these variables are independent of the transmitted signal bandwidth.

4. *Club Membership*. The ARRL requests that Section 97.5 of the Commission's Rules, 47 C.F.R. § 97.5, be amended to increase to at least four the minimum number of members needed for the purpose of holding a club station license. The ARRL states that if the issuance of new club station licenses is ever resumed, the present two-person requirement would invite applications from parties that are not clubs.[4] No new club station licenses, however, have been issued in nearly thirteen years and at this time we do not foresee that we will resume doing so. To increase the number of required club members, moreover, could deny license renewal and modification to some of the existing 2,065 club stations. No change, therefore, is proposed herein.

5. *Station aboard ship or aircraft*. The ARRL requests deletion of the requirement in Section 97.11 of the Commission's Rules, 47 C.F.R. § 97.11, that an amateur station must be independent of all other radio apparatus installed on a ship or aircraft. The ARRL states that the other requirement in Section 97.11, which prohibits an amateur station's transmitted signal from causing interference to other apparatus, is sufficient regulation and argues that the independent apparatus requirement should, therefore, be deleted.[5] The non-interference requirement, however, is different from the independent apparatus requirement. We do not encourage amateur station apparatus being used as an alternative to maritime station apparatus nor would amateur station equipment generally meet the equipment certification requirements for the aviation or marine services. The distinction between these two services should not be blurred. We decline, therefore, to amend the rule as requested.

6. *Automatic control*. The ARRL requests that Section 97.109 of the Commission's Rules, 47 C.F.R. § 97.109, be revised to delete the prohibition against automatic control of an amateur station when it is transmitting third party communications.[6] The ARRL states that the content of a message being retransmitted by an amateur station should be the sole responsibility of the originating station. The concept of control of an amateur station and responsibility for the station's transmissions, however, is based on Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d). Control is not severable into technical control, content control of messages the licensee originates, and content control of messages originated by other users. When an amateur station is under local or remote control, the control operator directly supervises every transmission. Such is not the case where the station is operated under automatic control.[7] Amateur service licensees are free to create and pioneer communications systems. Our regulatory approach, therefore, is to state the basic requirements that each amateur operator and each station must observe.[8] Amateur stations are not common carrier communication systems although techni-

cally some configurations of amateur stations may be similar. All rules apply individually to each amateur station in the system, not to the resulting system. Each station licensee and each station control operator is responsible for the messages transmitted as well as those retransmitted by the station.[9] Therefore, no change in the rule is proposed.

7. In addition, ARRL requests that it be made clear in Section 97.109(d) that a Commission representative may order an automatically controlled station[10] to cease transmission because of improper operation or harmful interference only after the alleged offending station has been given the opportunity for a hearing.[11] We take this opportunity to clarify Section 97.109(d). When under local or remote control, an amateur station has the control operator at the control point. Because an automatically controlled station does not have the control operator at the control point who is able to shut down a transmitter operating in violation of the rules, we regard automatic control as being less reliable than local control or remote control and, therefore, in the nature of a subordinate privilege. In effect, automatic control of a station is similar in concept to secondary status in a frequency band; a condition of using this type of control is that it may be used only so long as the station does not cause any interference or no improper transmission radiates from the station. Accordingly, we clarify that, under the terms of Section 97.109(d), the control operator must cease automatic control of the station upon notification by an Engineer In Charge (EIC) that the station is transmitting improperly or causing interference to other stations, and the licensee is not entitled to a hearing before such notification by the EIC.[12] The station may, however, continue to operate using local or remote control and, therefore, the station has not been ordered to cease transmitting. This approach is similar to that taken in other areas.[13]

8. *Retransmission from other service*. The ARRL requests that Sections 97.111 and 97.113 of the Commission's Rules, 47 C.F.R. §§ 97.111 and 97.113, be amended to permit amateur stations to retransmit National Oceanic and Atmospheric Administration (NOAA) broadcasts and Department of Commerce time and propagation forecast broadcasts. The ARRL states that such retransmissions are of great usefulness and interest to amateur operators.[14] Mr. Eric R. Wolfe opposes retransmission of NOAA weather broadcasts on amateur service frequencies pointing out that there are many other sources for obtaining weather information.[15] The ARRL request is repetitious because the issue was addressed in PR Docket 88-139 where we found no reason to allow the use of amateur service frequencies for such purposes because these transmissions are routinely available over the air with inexpensive receivers. The use of an amateur service channel for repetitive transmissions is inappropriate.[16] Therefore, we decline to amend the rule as requested.

9. *Amateur operator compensation*. The ARRL requests revision of the conditions in Section 97.113 under which a person may accept compensation for serving as the control operator of an amateur station. Currently, compensation may only be accepted by the control operator of a club station while it is transmitting telegraphy practice and information bulletins on all ten of the amateur service MF and HF bands. The ARRL states that transmission on ten bands is neither practicable nor necessary.[17] It states that club station W1AW, the station licensed to the ARRL Headquarters Operators Club, has the capability to transmit on only six of the bands and that the desired coverage is obtained. Mr. Wolfe, in contrast, opposes the transmission of bulletins and telegraphy practice on amateur service frequencies.[18] The ARRL request, however, appears of benefit to the amateur community and is consistent with the intent of the rule. Therefore, we propose to amend this rule to allow a club station control operator to accept compensation when the station schedules operations on at least six amateur service MF and HF bands.

10. *International third party communications*. The ARRL requests that Section 97.115 of the Commission's Rules, 47 C.F.R. § 97.115, which allows an amateur station to transmit messages for a third party, be amended. The requested amendment would allow a Commission-licensed amateur station to transmit communications for a third party, who holds some type of amateur service license, to a country that has not made the necessary third party communications arrangements with the United States.[19] The ARRL states that this change would permit third party communications[20] for amateur operators who may not have the correct class of license or whose foreign license does not authorize the third party to be the control operator of a Commission-licensed amateur station. This argument was considered in our recent actions in the rewrite of the amateur service rules.[21] The ARRL request is repetitious in addition to, in our view, violating international regulations, and, therefore, no change in the rule is proposed.[22]

Subpart B -- Station Operation Standards

11. *Station identification*. Mr. Trexler requests that Section 97.119 of the Commission's Rules, 47 C.F.R. § 97.119, be amended to require a station to identify at the beginning of a communication through a repeater.[23] Mr. Wolfe, moreover, wants this request extended to all amateur service communications.[24] Mr. Popkin, however, states that the change is unnecessary because most repeaters are automatically controlled. The repeater control operator, additionally, has the option of terminating the transmission if the user does not cooperate as requested.[25] Although we have not proposed a change in the rules, we request comments regarding the suggested identification procedure.

12. *Quiet hours*. The ARRL requests amendment of Section 97.121 of the Commission's Rules, 47 C.F.R. § 97.121, to state specifically therein the due process procedures to which the licensee is entitled when the Commission imposes quiet hours upon an amateur station. Although we proposed a simplification of this rule in the rewrite of the amateur service rules,[26] the proposal met with strong opposition. We decided, therefore, against changing the rule and kept its original wording intact. Further, it would be duplicative and unnecessary to list the procedure for review of actions in every substantive rule. Therefore, no change in the rule is proposed.

Subpart C -- Special Operations

13. *Auxiliary station*. The ARRL requests that Section 97.201 of the Commission's Rules, 47 C.F.R. § 97.201, be amended to delete the condition that an auxiliary station can be automatically controlled only when it is part of a repeater system, so that amateur operators can experiment with new system configurations that use auxiliary links.[27] Generally, we encourage automatic control wherever the use of devices and procedures for control of an amateur

station ensures that compliance with the rules is achieved. Accordingly, we propose to amend Section 97.201 as requested.

14. *Space station*. In Section 97.207 of the Commission's Rules, 47 C.F.R. § 97.207, the ARRL suggests a separate provision for space telemetry operation. The ARRL states that the rule should be more flexible than the current rule which limits space telemetry transmissions to those that are results of measurements.[28] The ARRL proposes that the rule be expanded to allow space telemetry transmissions of specially coded messages intended to facilitate communications in addition to transmissions that are the results of measurements. We concur and propose to expand the permissible types of space telemetry transmissions as requested by the ARRL.

15. *Remote control*. The ARRL requests that the caption of Section 97.211 of the Commission's Rules, 47 C.F.R. § 97.211, be revised to read "Space telecommand". In Sections 97.213 and 97.215 of the Commission's Rules, 47 C.F.R. §§ 97.213 and 97.215, ARRL requests that the term "remote control" be changed to "telecommand." Also, ARRL requests that Section 97.213 incorporate a statement that an amateur station under telecommand must be within the Earth's atmosphere. Further, with respect to telecommand of model craft, ARRL suggests Section 97.215 specify that such operation be limited to those frequencies above 50 MHz where data emission types are authorized. The ARRL states that there should also be regulations governing telemetry from objects such as ballons, model surface craft and model aircraft.[29] These are minor technical amendments which will clarify the application of the rule. We propose, therefore, to amend the rules as requested.

Subpart D -- Technical Standards

16. *Tone modulated telegraphy*. Mr. King requests that Section 97.305, 47 C.F.R. § 97.305, be amended to permit emission types A2B and F2B, tone-modulated telegraphy, in all frequency segments where emission type F1B, telegraphy for automatic reception, is now authorized.[30] We did this in PR Docket No. 88-139 for all amateur service frequencies in the VHF, UHF, SHF, and EHF wavelength bands, but we found no justification to do so for the MF and HF wavelength bands due to our obligation under the international regulations to limit the interference potential of amateur stations.[31] Mr. King provides no additional information or justification, therefore no changes are proposed herein.

17. *Digital codes*. The ARRL requests that Section 97.309 of the Commission's Rules, 47 C.F.R. § 97.309 be amended to incorporate the popular terms for three digital codes in their definitions.[32] The three digital codes defined in Section 97.309 are the 5-unit, start-stop, International Telegraph Alphabet No. 2 code (commonly known as Baudot), the 7-unit code specified in International Radio Consultative Committee Recommendation CCIR 476-2 (1978), 476-3 (1982), 476-4 (1986) or 625 (1986) (commonly known as AMTOR), and the 7- unit code defined in American National Standards Institute X3.4-1977 (commonly known as ASCII). We propose the amendment as requested.

18. *Power amplifier ban*. The ARRL requests that Section 97.317 of the Commission's Rules, 47 C.F.R. § 97.317, be deleted.[33] The ARRL states that it is not the ban that assists enforcement efforts against unlawful use of power amplifiers in the CB service, but rather it is that the sellers have failed to obtain type acceptance for their amplifiers.[34] The ARRL requests, therefore, that the ban be lifted because it is unnecessary to the Commission's enforcement effort and that it reduces the effectiveness of certain amateur service communications.[35] Mr. Wolfe would also eliminate the ban but require that the seller of amplifiers be held responsible for assuring that the customer has a valid license for the frequency bands on which the amplifier is capable of operating. The ARRL's understanding of our enforcement activity, however, is inaccurate. The ban on power amplifiers makes our enforcement procedures more efficient and effective. Without the ban, we believe our enforcement demands would certainly increase. We decline, therefore, to amend the rule as requested.

Subpart F -- Qualifying Examination Systems

19. *Telegraphy examinations*. Mr. Girton proposes that Section 97.503, 47 C.F.R. § 97.503 be revised to delete from the examinations all telegraphy prosign characters except the slant mark. Mr. Bilow disputes the petitioner's claim that prosigns are not used on the air.[36] We do not propose this change, therefore, because it could result in new operators not knowing or understanding some of the characters that are routinely used in messages transmitted by amateur stations. It would, moreover, require the volunteer examiners (VEs) to revise all telegraphy examinations. Mr. Girton also proposes changes in the sending speed for element 1(B). This is repetitious because the amateur operator license requirements were adopted after careful consideration was given to many thousands of comments filed by interested parties in numerous major rule making proceedings.[37] Finally, he proposes amendments to Section 97.507 and 97.513 of the Commission's Rules, 47 C.F.R. §§ 97.507 and 97.513 not to allow General Class operator licensees to be VEs.[38] The only class of license for which a General Class operator can administer an examination is the Novice Class operator license. Inasmuch as we have proposed to discontinue issuing new Novice Class operator licenses in PR Docket 90-55,[39] consideration of this request is premature. We, therefore, dismiss this request without prejudice.

20. *Volunteer Examiners*. The ARRL requests that Section 97.515 of the Commission's Rules, 47 C.F.R. § 97.515, be amended to allow a person whose amateur station license or amateur operator license was revoked or suspended to serve as a volunteer examiner (VE) after a ten year period.[40] Mr. Wolfe would lower the waiting period to five years.[41] Mr. van de Kamp[42] disagrees, stating that no one should be a VE if that person's VE accreditation has been removed by another Volunteer-Examiner Coordinator (VEC), or has ever had another VEC refuse to coordinate an examination session where that person would be an administering VE.[43] Integrity is the cornerstone of the volunteer examiner system and is a paramount factor used to protect its effectiveness. Inasmuch as there is a sufficient number of qualified persons willing to serve as VEs, there is no reason to accredit as a VE a person who has a history of rule violations.

IV. PROCEDURAL MATTERS

21. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

22. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

23. Any person who is making an oral *ex parte* presentation and presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

24. Authority for issuance of this *Notice* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **January 31, 1991,** and reply comments on or before **March 4, 1991.** Extensions of time are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments and reply comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments must state the proceeding to which they relate (PR Docket Number). They should be sent to the Secretary, Federal Communications Commission, Washington, D. C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D. C. 20554.

25. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, the Commission certifies that these minor rule changes would not, if promulgated, have a significant economic impact on a substantial number of small entities. The Amateur Radio Service may not be used to transmit any communication to facilitate the business or commercial affairs of any party. *See* 47 C.F.R. § 97.113(a).

26. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements and will not increase or decrease burden hours imposed on the public.

27. A copy of this *Notice* will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

28. The subject petitions ARE GRANTED insofar as the requests contained therein are proposed in this *Notice*, and ARE DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulation is proposed to be amended as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U. S. C.§ 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U. S. C. §§ 301-609, unless otherwise noted.

2. Section 97.3 is amended by revising paragraph (a)(8), by redesignating paragraphs (a)(36), (a)(37), (a)(38), (a)(39) and (a)(40) as paragraphs (a)(37), (a)(39), (a)(41), (a)(42) and (a)(43), and by adding new paragraphs (a)(36), (a)(38) and (a)(40) to read as follows:

§ 97. 3 Definitions.

(a) * * *

(8) *Bandwidth*. The width of a frequency band outside of which the mean power of the transmitted signal is attenuated at least 26 dB below the mean power of the transmitted signal within the band.

* * * * *

(36) *Space telemetry*. Telemetry for the transmission from a space station of results of measurements made in a spacecraft, including those relating to the functioning of the spacecraft.

(38) *Telecommand*. A one-way transmission to initiate, modify, or terminate functions of a device at a distance.

(40) *Telemetry*. A one-way transmission of measurements at a distance from the measuring instrument.

* * * * *

3. Section 97.111 is amended by revising paragraph (b)(3) and by adding new paragraph (b)(7) to read as follows:

§ 97.111 Authorized transmissions

* * * * *

(b) * * *

(3) Transmissions necessary to telecommand a device from a distant location.

* * * * *

(7) Transmissions of telemetry.

4. Section 97.113(b)(2) is revised to read as follows:

§ 97.113 Prohibited transmissions.

* * * * *

(b) * * *

(2) The station schedules operations on at least six amateur service MF and HF bands using reasonable measures to maximize coverage;

* * * * *

5. Section 97.201(d) is revised to read as follows:

§ 97.201 Auxiliary station.

* * * * *

(d) An auxiliary station may be automatically controlled.

* * * * *

6. Section 97.207(f) is revised to read as follows:

§ 97.207 Space station.

* * * * *

(f) Space telemetry transmissions may consist of specially coded messages intended to facilitate communications or related to the function of the spacecraft.

* * * * *

7. The heading of Section 97.211 is revised to read as follows:

§ 97.211 Space telecommand station.

8. Section 97.213 is amended by revising the heading and the introductory text to read as follows:

§97.213 Telecommand of an amateur station.

An amateur station on or within 50 km of the Earth's surface may be under telecommand where:

* * * * *

9. Section 97.215 is amended by revising the heading to read as follows:

§ 97.215 Telecommand of model craft.

10. New Section 97.217 is added to read as follows:

§ 97.217 Telemetry.

Telemetry transmitted by an amateur station on or within 50 km of the Earth's surface is not considered to be codes or ciphers intended to obscure the meaning of communications.

11. Section 97.309(a) is revised to read as follows:

§ 97.309 RTTY and data emission codes.

(a) Where authorized by §§ 97.305(c) and 97.307(f) of this Part, an amateur station may transmit a RTTY or data emission using the following specified digital codes:

(1) The 5-unit, start-stop, International Telegraph Alphabet No. 2, code defined in International Telegraph and Telephone Consultative Committee Recommendation F.1, Division C (commonly known as Baudot).

(2) The 7-unit code specified in International Radio Consultative Committee Recommendation CCIR 476-2 (1978), 476-3 (1982), 476-4 (1986) or 625 (1986) (commonly known as AMTOR).

(3) The 7-unit code defined in American National Standards Institute X3.4-1977 or International Alphabet No. 5 defined in International Telegraph and Telephone Consultative Committee Recommendation T.50 or in International Organization for Standardization, International Standard ISO 646 (1983), and extensions as provided for in CCITT Recommendation T.61 (Malaga-Torremolinos, 1984) (commonly known as ASCII).

* * * * *

FOOTNOTES

[1] RM-7241, filed by William H. King (King), RM-7242, filed by Gordon Girton (Girton), RM-7243, filed by The American Radio Relay League, Inc. (ARRL), and RM-7244, filed by B. Lewis Trexler (Trexler).

[2] ARRL petition at 19-20, and Appendix at ii.

[3] The term "channel" is used in Sections 97.119(a), 97.203(b), 97.401(d) and 97.407(b)(3) of the rules.

[4] ARRL petition at 9-10.

[5] ARRL petition at 10-11.

[6] ARRL petition at 11, 14. Section 97.109(e) provides an exception for stations retransmitting digital packet radio communications on 6 meters and shorter wavelength bands. Such stations must use a specified protocol. The retransmitted messages must originate at a station that is being locally or remotely controlled.

[7] *See Memorandum Opinion and Order*, PR Docket No. 85-105, 1 FCC Rcd 166 (1986).

[8] *See Notice of Proposed Rule Making*, PR Docket No. 88-139, 3 FCC Rcd 2076 (1988).

[9] *See Order*, adopted April 19, 1982, by Chief, Private Radio Bureau, denying petitition for reconsideration in RM-3618, Mimeo No. 3543.

[10] Only stations transmitting certain narrow-band direct-printing telegraphy emissions (RTTY) or data emissions above 50 MHz and other stations including auxiliary, beacon and repeater stations specifically designated in Part 97 may be automatically controlled.

[11] ARRL petition at 11-12.

[12] Were hearings required in this situation, the Commission would have to reassess whether the public interest is served by a rule permitting operation under automatic control.

[13] *See, e. g.*, 47 C.F.R. § 74.703 (low power television), *see also* 15 C.F.R. § 5(c) (radio frequency devices).

[14] ARRL petition at 12-13.

[15] Comments of Eric Wolfe at 1.

[16] 4 FCC Rcd 4719 (1989).

[17] ARRL petition at 13-14.

[18] Comments of Eric Wolfe at 1.

[19] ARRL petition at 14.

[20] *See* Nos. 2733 and 2734 of the ITU Radio Regulations (Geneva, 1979) which state that it is absolutely forbidden for amateur stations to transmit international communications on behalf of a third party unless there is a special arrangement between the countries concerned. The United States has third party communication arrangements with forty-three countries. *See* Public Notice *Amateur Service International Radio Communications*, dated January 31,1990.

[21] Section 97.115 incorporates this requirement but provides an exception where the message is for any third party who is eligible to be the control operator of the station. This exception eliminates the necessity for the third party to travel to the station in order to send the message, as the first party control operator, to a station in a country that has not agreed to permit third party communications with the United States.

[22] 4 FCC Rcd 4719 (1989).

[23] Trexler petition at 2.

[24] Comments of Eric Wolfe at 1.

[25] Comments of David Popkin at 1.

[26] 3 FCC Rcd 2076, 2096 (1988).

[27] ARRL petition at 17-18.

[28] ARRL petition at 19.

[29] ARRL petition at 18-19.

[30] King petition at 1.

[31] *See* 3 FCC Rcd 2076 (1988) at para. 18-20.

[32] ARRL petition at 5.

[33] This rule provides that an external radio frequency power amplifier, hereinafter amplifier, cannot receive a grant of type acceptance if it is capable of transmitting on or adjacent to frequencies in the 11 meter Citizens Band (CB) Radio Service. In addition, Section 97.317 provides that an amplifier must satisfy certain spurious emission standards. Moreover, type acceptance may be denied altogether when denial would prevent the use of these amplifiers in services other than the amateur service.

[34] ARRL petition at 22.

[35] ARRL petition at 23.

[36] For example, comments of Michael Bilow at 4.

[37] For example, *See* 2 FCC Rcd 727 (1987).

[38] Girton petition at 1.

[39] *See* 5 FCC Rcd 880 (1990). Proposed Sections 97.507 and 97.511 address this proposal.

[40] ARRL petition at 24.

[41] Comments of Eric Wolfe at 1-2.

[42] The period for filing comments to the ARRL petition (RM-7243) closed on March 2, 1990. Mr. van de Kamp's comments are late in that they were filed on April 30, 1990. Nevertheless, in order to have a complete a record as possible, we accept his late-filed comments.

[43] Comments of William van de Kamp at 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

ERRATUM

Released: October 31, 1990

1. On October 4, 1990, this Commission released a Second Report and Order in the above docket adopting final rules implementing price cap regulation for local exchange carriers (LECs).[1] That Second Report and Order is hereby corrected in the manner described in the following paragraphs.

2. In paragraph 261, footnote 324 is corrected to read as follows:

[324] *See generally*, Sections 69.605 and 69.606 of our Rules, 47 C.F.R. §§ 69.605, 69.606, and the following orders regarding "average schedule" companies: In the Matter of NECA's Proposed Waiver of Section 69.605(c) of the Commission's Rules, Memorandum Opinion and Order, 2 FCC Rcd 3960 (Com.Car.Bur. 1987); In the Matter of Papago Tribal Utility Authority Petition for Waiver of § 69.605(c) of the Commission's Rules, Memorandum Opinion and Order, 2 FCC Rcd 6631 (Com.Car.Bur. 1987); In the Matter of Petitions See king Average Schedule Settlements for Affiliated Cost Companies with 5,000 or Fewer Access Lines, Memorandum Opinion and Order, 3 FCC Rcd 6003 (Com.Car.Bur.1988).

3. In paragraph 267, the last sentence is corrected to read as follows:

> "Under the rules we adopt today, currently pooled LECs will be permitted to give notice of withdrawal from the NECA pools by the end of this year for the purpose of becoming subject to price cap regulation as of July 1, 1991.[336]" and footnote 336 to that sentence is corrected to read as follows:

[336] Current Commission Rules limit pooled LECs to a single annual December notice of withdrawal from the NECA pools effective the following July 1. In addition, the decision to withdraw from the Common Line (CL) Pool may be influenced by our rules governing Transitional Support (TRS) and Long Term Support (LTS). LECs that leave the CL pool will be obligated to contribute to both TRS and LTS under § 69.612. Eligibility for TRS payments is limited to certain LECs that have previously depooled and qualified for such payments. LTS is still available to LECs that remain in NECA's pools. *See* Section 69.612 of our rules, 47 C.F.R. § 69.612.

4. In paragraph 276, footnote 351 is corrected to read as follows:

[351] Smaller LECs that qualify as "average schedule" companies under §§ 69.605 and 69.606 of our Rules are eligible to use simpler settlement mechanisms, rather than employing actual cost accounting, to secure compensation for the services they provide. *See generally*, In the Matter of MTS and WATS Market Structure: Average Schedule Companies, Report and Order, 103 FCC 2d 1017 (1986); *recon.* 3 FCC Rcd 834 (1987); *remanded sub nom. City of Brookings Municipal Telephone Co., et al. v. FCC*, 822 F. 2d 1153 (D.C Cir. 1987); In the Matter of Revisions to the Average Schedules Proposed by NECA on October 3, 1988, Memorandum Opinion and Order, 4 FCC Rcd 2804 (Com.Car.Bur. 1989); In the Matter of NECA's Proposed Revisions to the Average Schedules, Memorandum Opinion and Order, 5 FCC Rcd 4068 (Com.Car.Bur. 1990).

5. In paragraph 278, the last sentence is corrected to read as follows: "Our determination that 'average schedule' companies may be exempted from the all-or-nothing price cap rule is in potential conflict with our NECA depooling rules, which require LECs leaving the Common Line pool to do so on an all-or-nothing basis.[357]" and footnote 357 to that sentence is corrected to read as follows:

[357] *Compare* Section 61.41(a)(2) and (3) *with* Section 69.3(e)(9). Under the latter rule, when a LEC withdraws from the Common Line pool, both its cost and "average schedule" affiliates must also be withdrawn from that pool.

6. In paragraph 411, the eighth and ninth sentences are removed.

7. In paragraph 413, the third sentence is corrected to read, " *See* 5 U.S.C. § 553(d)(3)."

8. In paragraph 414, the phrase "and § 69.411" is removed.

9. This and all subsequent items in this Erratum pertain to Appendix B of the above Second Report and Order. The heading of Section 61.39 is corrected to read as follows:

§ 61.39

Optional supporting information to be submitted with letters of transmittal for Access Tariff filings effective on or after April 1, 1989, by local exchange carriers serving 50,000 or fewer access lines in a given study area that are described as subset 3 carriers in § 69.602.

10. In Section 61.41, paragraph (c)(3) is corrected to read as follows: "(c)(3) Nothwithstanding the provisions of § 61.41(c)(2) above, when a telephone company subject to price cap regulation acquires, is acquired by, merges with, or otherwise becomes affiliated with a telephone company that qualifies as an 'average schedule' company, the latter company may retain its 'average schedule' status or become subject to price cap regulation in accordance with Section 69.3(i)(3) and the requirements referenced in that Section."

11. In Section 61.42, paragraph (d)(4) is corrected to read as follows: "(d)(4) To the extent that a local exchange carrier specified in § 61.41(a)(2) or (3) above offers interstate interexchange services that are not classified as access services for the purposes of Part 69 of this Commission's Rules, such exchange carrier shall establish a fourth basket for such services."

12. In Section 61.42, paragraph (e)(1) is corrected to read as follows: "(e)(1) The traffic sensitive switched interstate access basket shall contain such services as the Commission shall permit or require, including the following

service categories: (i) local switching, as described in § 69.106; (ii) information, as described in § 69.109; and (iii) transport, as described in §§ 69.111 and 69.112 of this chapter."

13. In Section 61.46, the introductory text of paragraph (d), the definition of "CL_{MOU}," and the definition of "$EUCL_{MOU}$," are each corrected and a new paragraph (f) is added as follows:

(d) In connection with any price cap tariff proposing changes to rates for services in the basket designated in § 61.42(d)(1), the maximum allowable carrier common line (CCL) charges shall be computed pursuant to the following methodology:

* * * * *

CL_{MOU} = the sum of each of the existing maximum allowable Carrier Common Line rates multiplied by its corresponding base period Carrier Common Line minutes of use plus each existing End User Common Line (EUCL) rate multiplied by its corresponding base period lines, divided by the sum of all types of base period Carrier Carrier Common Line minutes of use,

$EUCL_{MOU}$ = proposed End User Common Line rates multiplied by base period lines and divided by the sum of all types of base period Carrier Common Line minutes of use, and

* * * * *

(f) The "1 / (1 + (g/2)" component of the CCL_{MOU} formula contained in paragraph (d) shall be employed only in the adjustment made in connection with the annual price cap filing.

14. In Section 69.3, the introductory text to paragraph (i), paragraphs (i)(1), (i)(2), and (i)(3) are each corrected to read as follows:

(i) The following rules apply to the withdrawal from Association tariffs under the provisions of paragraphs (e)(6) or (e)(9) or both by telephone companies electing to file price cap tariffs pursuant to § 69.3(h).

(1) In addition to the withdrawal provisions of § 69.3 (e)(6) and (9), a telephone company that participates in one or more Association tariffs during one tariff year and that elects to file price cap tariffs effective July 1 of the following tariff year, shall provide the Association with at least 6 months' notice that it is withdrawing from all Association tariffs, subject to the terms of this Rule, to participate in price cap regulation.

(2) The Association shall maintain records of such withdrawals sufficient to discharge its obligations under these Rules and to detect efforts by such companies or their affiliates to rejoin any Association tariffs in violation of the provisions of paragraph (i)(4) below.

(3) Notwithstanding the provisions of § 69.3(e)(6) and (9), in the event a telephone company withdraws from all Association tariffs for the purpose of filing price cap tariffs, such company shall exclude from such withdrawal all "average schedule" affiliates and all affiliates so excluded shall be specified in the withdrawal. However, such company may include one or more "average schedule" affiliates in price cap regulation provided that each price cap affiliate relinquishes "average schedule" status and withdraws from all Association tariffs and any tariff filed pursuant to § 61.39(b)(2). *See generally*, Sections 69.605(c), 61.39(b); MTS and WATS Market Structure: Average Schedule Companies, Report and Order, 103 FCC 2d 1026-1027 (1986).

15. In Section 69.113, the last sentence of paragraph (c) is corrected to read as follows: "Through June 30, 1993, the non-premium charge shall be computed by multiplying the LS2 charge for such element by .45."

16. In Section 69.205, the last sentence of paragraph (c) is corrected to read as follows: "For telephone companies that are not subject to price cap regulation, as that term is defined in § 61.3(v) of this chapter, the premium Local Switching revenue requirement shall be computed by subtracting the projected revenues from non-premium charges attributable to the Local Switching element from the revenue requirement for each element."

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, FCC 90-314, released Oct. 4, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-521

In the Matter of

Amendment of Section 73.202(b), RM-7465
Table of Allotments,
FM Broadcast Stations.
(Clinton, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 22, 1990; Released: November 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Weber-King Broadcasting ("petitioner"), licensee of Station KHPQ(FM), Channel 221A, Clinton, Arkansas, requesting the substitution of Channel 221C3 for Channel 2221A at Clinton and modification of its license for Station KHPQ(FM) to specify operation on the higher powered channel. Petitioner states that it desires to provide expanded coverage FM service to Clinton, and that it will expeditiously apply for the channel, if allotted.

2. A staff analysis reveals that Channel 221C3 can be substituted for Channel 221A at Clinton at the petitioner's suggested site located 19 kilometers (11.8 miles) east of the community,[1] consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. Additionally, the staff has determined that the proposed 1 mv/m contour of Station KHPQ(FM) does not lie within the Grade B contour of any Channel 6 television station.[2]

3. We believe the public interest would be served by the proposal since it could provide Clinton with an expanded coverage area FM service. As requested, we also propose to modify petitioner's license for Station KHPQ(FM) to specify operation on the higher-powered channel. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 221C3 at Clinton, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Clinton, as follows:

	Channel No.	
City	Present	Proposed
Clinton, Arkansas	221A	221C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Weber-King Broadcasting
Attn: Sid King
P.O. Box 33
Clinton, AR 72031

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the petitioner's suggested site for Channel 221C3 at Clinton are 35-39-52 and 92-16-06. Use of the suggested site negates a short-spacing to Station KASU(FM), Channel 220C1, Jonesboro, Arkansas, at coordinates 35-53-24 and 90-40-26, Station KXRJ(FM), Channel 220A, Russellville, Arkansas, at coordinates 35-17-47 and 93-08-18, and Station KIPR(FM), Channel 222C1, Pine Bluff, Arkansas, at coordinates 34-22-12 and 92-10-07.

[2] The Commission, in amending its rules to permit higher powered operation on channels previously reserved for Class A use only, stated, "It is appropriate to ensure the continued availability of adequate noncommercial educational radio services in TV Channel 6 markets. Thus, where the Grade B contour of the Channel 6 TV station and the 1 mV/m signal contour of the proposed upgraded facility on Channel 221 would overlap, a petitioner seeking to upgrade will bear a particularly heavy burden in demonstating that a grant of its request to upgrade is in the public interest." *See First Report and Order,* MM Docket No. 86-144, 2 FCC Rcd 660, 661 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEGRAM CORP. File No. I-T-C-90-123

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 15, 1990; Released: November 21, 1990

By the Chief, International Facilities Division:

1. The above-captioned application filed by American Telegram Corp. (ATC) on June 5, 1990 and supplemented by letter of July 3, 1990 requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the services of other common carriers to provide data communications between the U.S. and the international points set forth in Western Union Corp.'s (WUC) Tariffs F.C.C. Nos. 260 and 283 and the American Telephone and Telegraph's (AT&T) Tariffs F.C.C. Nos. 1 and 2. The application was placed on public notice on June 13, 1990. No comments were received.

2. ATC is a California corporation. By the instant application, ATC proposes to offer international telex and telegram service between the U.S. and international points by the resale of the telex and telegram services set forth in WUC's Tariffs F.C.C. Nos. 260 and 283 as well as by resale of WUC's enhanced Easylink service. In addition, ATC proposes to offer international telegram service by means of facsimile through the resale of the international switched telephone serivces set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2. ATC states that it "will contract with and maintain operating agreements with persons or entities in the various foreign destinations who are legally qualified to execute transmission services for the lines of the local carrier or data service provider." We shall require ATC to obtain any necessary operating arrangements in each of the countries to which it provides service. ATC believes the data market between the United States and foreign points is growing and will continue to grow significantly and that additional market entry is therefore feasible and will stimulate new demand.

3. In authorizations of new entrants over the past decades, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international telegram and telex service by the resale of the telegram, telex and Easylink services of WUC and the provision of telegram service by means of facsimile through the resale of the international switched voice services of AT&T.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-123 IS GRANTED, and ATC is authorized to provide international telegram service by means of facsimile service through the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, between the contiguous U.S. and the international points named in those tariffs, and to provide international telex and telegram service by the resale of the international telex and telegram service set forth in WUC's Tariff's F.C.C. Nos. 260 and 283 between the contiguous U.S. and those international points named in those tariffs as well as by the resale of WUC's enhanced Easylink service.

6. IT IS FURTHER ORDERED that ATC shall obtain any necessary operating arrangements in each of the countries to which it provides service and shall file with the Commission any operating agreements with its correspondents within 30 days of their execution.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F. R. Section 43.61 (October 1, 1989).

9. IT IS FURTHER ORDERED that nothing in this authorization shall be construed to include authorization for the transmission of money in connection with the services ATC seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order shall be construed as containing authority for the transmission of money.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon its adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, Teltec Saving Communications Co., File No. I-T-C-86-062, Mimeo No. 3548, n. 2 (released April 4, 1986).

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suspension of License of

Frederick K. Stark
RD #1 Box 191
Elizaville, N.Y. 12523

General Radiotelephone Operator
License PG-2-16541

ORDER TO SHOW CAUSE AND SUSPENSION ORDER

Adopted: October 29, 1990; Released: October 30, 1990

1. The Chief, Field Operations Bureau is hereby suspending the General Radiotelephone Operator License, PG-2-16541, issued to Frederick K. Stark on January 2, 1985. This action is based upon Mr. Stark's violation of Section 301 of the Communications Act of 1934, as amended (the Act), and of Section 13.62 of the Commission's rules, 47 C.F.R. §13.62.

2. Section 303(m)(1)(A) of the Act authorizes the Commission to suspend an operator's license for violations of the Commission's rules or the Act. On December 17, 1989, FCC personnel inspected the radio station operated by Stark after monitoring his operations on 1000 KHz on the AM frequency band.

3. The investigation was prompted by complaints received from the New York State Broadcasters Association alleging interference to a licensed station on 1010 KHz. The station operated by Stark, which gave "WNYS" as its call sign, was not an FCC licensed facility. The unauthorized broadcasts consisted of rebroadcast programs from the U.S. Armed Forces Radio Network and "news" from the John Birch Society.

4. The unauthorized operation of a radio station is a violation of Section 301 of the Communications Act. It is also a violation of the general prohibitions against violations of the Act applicable to commercial radio operators under Section 13.62 of the Commission's rules. Illegal radio operations can cause interference to aviation and marine navigation equipment and to other public safety radio services. Criminal sanctions, upon conviction, may include fines of up to $100,000 and/or one year in prison.

5. The Commission has reviewed the actions of Mr. Stark and determined that it would be warranted in refusing to grant an application for license filed by the licensee were such an application before it, and that he lacks the requisite qualifications to be a Commission licensee. Character questions "focus on the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policy." *Character Qualifications*, 102 FCC 2d 1179, 1183, *recon. denied*, 1 FCC Rcd 421 (1986).

6. Accordingly, General Radiotelephone Operator License PG-2-16541 is hereby suspended for a period of one year. If Mr. Stark makes written application for a hearing this Order will automatically be held in abeyance. An Administrative Law Judge, after an evidentiary hearing, will decide whether the suspension will take effect. The date, place and presiding Judge for the hearing would be set by a later order.

7. It is further Ordered that if a hearing is not requested within fifteen days (15) after receipt of this order, the suspension will take effect automatically. If the licensee does not apply for a hearing he must mail his General Radiotelephone Operator License and verification card to the Chief, Field Operations Bureau, Federal Communications Commission, 1919 M Street, N.W., Wash., D.C. 20554, ATTN: Radio Operator Branch, on or before expiration of the fifteen day period.

8. This action is being taken pursuant to Sections 303(m)(1)(A) of the Communications Act, and Sections 0.111(a), (b), 0.311 and 1.85 of the Commission's rules. 47 C.F.R. §§0.111(a),(b), 0.311, 1.85.

9. This Order is being sent by Certified Mail--Return Receipt Requested and by regular mail. Any questions regarding this proceeding should be directed to the Chief, Radio Operator Branch at (202) 632-7240.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-418

In the Matter of

Amendment of Section 73.202(b),	RM-6879
Table of Allotments,	RM-7252
FM Broadcast Stations.	
(Milan, Metter, Swainsboro	
and Wrens, Georgia[1]	

ORDERS TO SHOW CAUSE

Adopted: November 5, 1990; Released: December 3, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 7037 (1989), issued in response to a petition for rule making filed by Val-Tel, Inc. ("Val-Tel"), proposing the substitution of Channel 245C3 for Channel 244A at Wrens, Georgia, and modification of its license for Station WRDW(FM) to specify operation on the higher powered channel. Tel-Dodge Broadcasting Company, Inc., licensee of Station WMCG(FM), Milan, Georgia, filed a petition for rule making requesting the substitution of Channel 285C2 for Channel 285A at Milan, Georgia, and modification of its license to specify operation on Channel 285C2. In order to accommodate the channel substitution at Milan, Tel-Dodge also proposes the substitution of Channel 279A for Channel 285A at Metter, Georgia, and the substitution of Channel 245A for Channel 280A at Swainsboro, Georgia. Although we originally dismissed the petition for rule making as unacceptable for consideration, Tel-Dodge filed a petition for reconsideration of that action, and Tel-Dodge's request subsequently became acceptable. The substitutions at Wrens and Swainsboro are mutually exclusive. Therefore, we have treated Tel-Dodge's petition as a counterproposal in this proceeding.[2] Val-Tel filed comments reaffirming its interest in the proposal. In response to the counterproposal Val-Tel and Tel-Dodge filed reply comments. In addition, Ed Winton, licensee of Station WMLO(FM), Havana, Florida, also filed reply comments.

2. In response to the counterproposal Tel-Dodge states that the only conflict between the proposal to allot Channel 245C3 to Wrens, Georgia, is the proposed substitution of Channel 245A in lieu of Channel 280A at Swainsboro. Tel-Dodge states that this conflict can be resolved by allotting Channel 263A to Swainsboro rather than Channel 245A. This change in the proposed allotment to Swainsboro would allow both the Val-Tel and Tel-Dodge proposals to be granted. Tel-Dodge goes on to state that if the conflict cannot be resolved its proposal would best serve the public interest. Tel-Dodge states that a upgrade at Station WMCG would provide a second service to 214 people, a third service to 12,998 people, a fourth service to 31,412 people and fifth service to 16,892. Therefore, argues Tel-Dodge, its proposal would bring new service to a total of 61,516 people who are now underserved, while Val-Tel's proposal would serve only 39,717 people.

3. Tel-Dodge states its willingness to reimburse the licenses of Station WHCG(FM), Metter, Georgia, and Station WXRS(FM), Swainsboro, Georgia, for the reasonable expenses they incur in changing their operating frequencies on the new channels proposed.

4. Val-Tel filed reply comments in response to the counterproposal, stating that the short-spacing problem between Val-Tel and Tel-Dodge's proposal can be resolved if Channel 263A can be substituted for Channel 280A at Swainsboro, Georgia, at its present transmitter site. In addition, Val-Tel notes, Station WXRS would also be able to operate with 6 kW with a slight change in site. Val-Tel states that such a solution would be consistent with the public interest, and would sever the two proposals. Val-Tel goes on to state that if the Commission does not substitute Channel 263A for Channel 280A at Swainsboro, and a comparison of the two proposals is required under the allotment criteria, it is clear that Val-Tel's proposal is superior to that of Tel-Dodge. Val-Tel contends that its proposal to operate on Channel 245C3 would serve an additional 206,363 persons in the Wrens, Georgia, service area, while Tel-Dodge's proposal to operate on Channel 285C2 at Milan, Georgia, would serve only an additional 98,733 persons. Val-Tel argues that Tel-Dodge's petition is short-spaced to the reference coordinates for Channel 285C2 at Havana, Florida, and to an application to modify Station WMLO to operate on Channel 285C2 in Havana, Florida.

5. Winton filed reply comments to the counterproposal stating that Tel-Dodge's petition for reconsideration is a request to change Class A to Class A channels in Milan, Metter, and Swainsboro, Georgia. Winton states that he has no objection to these changes. However, Winton states that if Tele-Dodge is a proposing to change the allotment for Milan, Georgia, to Channel 285C2, he does object.

6. Both Val-Tel's and Winton's objections to Tel-Dodge's counterproposal are premised on short-spacings which would now appear to be moot. We find that Channel 285C2 can be allotted to Milan at coordinates North Latitude 32-09-32 and West Longitude 83-10-55. The referenced site eliminates the short-spacing to Station WMLO(FM), Channel 285C2, Havana, Florida. Winton was allotted Channel 285C2, Havana, Florida, at coordinates North Latitude 30-34-43 and West Longitude 84-15-59. *See* MM Docket 88-379, 4 FCC Rcd 5676 (1989). However, Winton now holds a construction permit for station WMLO(FM), Channel 285C2 at coordinates North Latitude 30-35-11 and West Longitude 84-14-11. These coordinates do not conflict with the allotment of Channel 285C2 at Milan. Therefore, Winton's comments will not be considered any further.

7. In order to proceed with the proposals in this proceeding, it is necessary to issue *Orders to Show Cause* to Station WXRS(FM), Channel 280A, Swainsboro, Georgia, and Station WHCG(FM), Channel 285A, Metter, Georgia, seeking comments as to why their licenses should not be modified to specify operation on Channel 263A and Channel 279A in lieu of Channel 280A and 285A, respectively. An engineering analysis confirms that Channel 245C3 can be substituted for Channel 244A at Wrens, Georgia. [3] Channel 285C2 can be substituted for Channel 285A at Milan, Georgia. Channel 279A can be substituted

for Channel 285A at Metter, Georgia, and Channel 263A can be substituted for Channel 280A at Swainsboro, Georgia, at its present transmitter site.[4]

8. We believe the public would be served by the proposed channel substitutions at Wrens and Milan, since each community would receive an expanded FM service. As requested, we shall propose to modify the licenses of Station WRDW(FM) at Wrens, Georgia, and Station WMCG(FM) at Milan, Georgia, to specify operation on Channels 245C3 and 285C2, respectively. In accordance with Section 1.420(g) of the Commission's Rules we shall not accept other expressions of interest in the proposed channels. In addition, because an opportunity has already been provided for the filing of counterproposals, we will not accept any additional counterproposals.

9. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Wm. Jimmy Page, TR/As Radio Metter, licensee of Station WHCG(FM), Channel 285A, Metter, Georgia, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 279A in lieu of Channel 285A.

10. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Lacom Communication, Inc. licensee of Station WXRS(FM), Channel 280A, Swainsboro, Georgia, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 263A in lieu of Channel 280A.

11. Pursuant to Section 1.87 of the Commission's Rules, Radio Metter and Lacom Communication, Inc. may, not later than **January 24, 1991,** file written statements showing with particularity why their licenses should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Radio Metter and Lacom Communication Inc. to furnish additional information. If licensees raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modifications, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Radio Metter and Lacom Communication Inc., will be deemed to have consented to the modifications as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modifications are ultimately found to be in the public interest.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Wm. Jimmy Page,
TR/As Radio Metter
P.O. Box 238
Metter, Georgia 304

Lacom Communication, Inc.
P.O. Box 1590
Swainsboro, Georgia 30401

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606(b) of the Commission's Rules*,46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Milan, Metter and Swainsboro, Georgia, have been added to the caption.

[2] Public Notice of the counterproposal was given on February 6, 1990, Report No. 1807.

[3] The coordinates for Channel 245C3 at Wrens are North Latitude 33-13-20 and West Longitude 82-17-50.

[4] The coordinates for Channel 285C2 at Milan are North Latitude 32-09-32 and West Longitude 83-10-55. The coordinates for Channel 279A at Metter are North Latitude 32-23-56 and West Longitude 82-02-16. The coordinates for Channel 263A at Swainsboro are North Latitude 32-34-52 and West Longitude 82-23-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-86

In the Matter of

Amendment of Section 73.202(b), RM-7155
Table of Allotments,
FM Broadcast Stations.
(Portage, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 5, 1990; Released: November 20, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 1266 (1990), proposing the allotment of FM Channel 240A to Portage, Wisconsin, as that community's second local FM service. The *Notice* was issued in response to a petition filed by WIBU, Inc. (petitioner). Petitioner filed comments restating its interest in the channel.[1] ODON Madison Limited Partnership (ODON) filed comments and a supplement and further supplement to its comments.[2] Kramer Broadcasting, Inc. (Kramer), filed opposition comments. Petitioner filed consolidated reply comments.

2. In its opposing comments, Kramer Broadcasting, Inc., licensee of AM Station WDDC and FM Station WPDR in Portage, Wisconsin, argues that the proposal to add a new channel to Portage would not be in the public interest as Portage is a very small town unable to support another FM radio station. According to Kramer, an additional channel in Portage would mean inadequate revenue, causing a financial cutback resulting in less service and community involvement and more satellite programming. Petitioner indicates its support of new allotments if they result in providing radio service to unserved or underserved areas. Petitioner indicates that neither situation exists in Portage and should not be a consideration in this proceeding.

3. ODON, licensee of Station WMLI(FM), Channel 242B1, Sauk City, Wisconsin, proposes a new site restriction on the allotment at Portage. In a separate but related proceeding, there is a proposal to substitute Channel 241C3 for Channel 244A at Oshkosh, Wisconsin, which required the site restriction on Channel 240A at Portage as indicated in the *Notice*.[3] ODON points out that a new site restriction is now possible for Channel 240A at Portage which would remove the conflict between Channel 242B1, Sauk City, and Channel 240A at Portage. ODON states that it has withdrawn its counterproposal in Docket 89-282 for the upgrade at Oshkosh and will continue to operate Station WUSW as a Class A facility with six kilowatts on either Channel 244 or 245. According to ODON, with the elimination of consideration of Channel 241C3 at Oshkosh, Channel 240A can be used at Portage from a site located approximately 13.9 kilometers northwest of the community in full compliance with the Commission's spacing requirements. ODON respectfully requests that the site restriction on the Portage allotment be changed as described above to permit the allotment of Channel 240A at Portage and the prompt approval of the Sauk City site change application.

4. Petitioner, in reply comments, states that Kramer's financial concerns provide no basis for denying a channel allotment. Petitioner argues that it is presumptuous for Kramer to contend that Station WDDC provides all the service required by the community and that there is no need for a second FM channel in Portage. Petitioner concludes that allotment of Channel 240A at Portage is in the public interest as diversity in programming will be provided without causing interference to existing stations.

5. After carefully considering all the information submitted, we conclude that the public interest would be served by the allotment of FM Channel 240A to Portage, Wisconsin, as that community's second FM service. Channel 240A can be allotted to Portage, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction 13.9 kilometers (8.6 miles) northwest of the community.[4] The site restriction will prevent a conflict with Station WYUR-FM, Channel 241A, Ripon, Wisconsin, and with a construction permit for Station WMCI, Channel 242B1, Sauk City, Wisconsin. The *Notice* specified a site restriction 10.5 kilometers (6.5 miles) southwest of the community to protect Channel 241C3 at Oshkosh. However, since the proposal for Oshkosh has been withdrawn, we have located a site for Channel 240A that will allow Sauk City to utilize its construction permit site as well as provide Portage with its second local FM service. The allegations of economic impact made by Kramer Broadcasting, Inc., are not relevant. *See, Report and Order* in MM Docket 87-68, 3 FCC Rcd 638 (1988); *recon. den.* 4 FCC Rcd 2276 (1989).

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 4, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Portage, Wisconsin	240A, 261A

7. The window period for filing applications for Channel 240A at Portage, Wisconsin, will open on **January 7, 1991,** and close on **February 6, 1991.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Although petitioner failed to submit a motion for acceptance of its late-filed comments, in light of the fact that acceptance of petitioner's expression of interest would not require the denial or dismissal of another timely proposal for use of the spectrum, we have accepted its comments.

[2] ODON Madison Limited Partnership filed the supplement and further supplement to its comments after the pleading cycle closed. The further supplement contains a letter dated July 24, 1990, filed in MM Docket No. 89-282, 4 FCC Rcd 4970 (1989), withdrawing its proposal to substitute Channel 241C3 for Channel 244A at Oshkosh, Wisconsin.

[3] *See*, 4 FCC Rcd 4970 (1989).

[4] The coordinates for Channel 240A at Portage are 43-38-15 and 89-34-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies Tariff F.C.C. No. 1 — Transmittal No. 385

ORDER

Adopted: November 19, 1990; Released: November 28, 1990

By the Chief, Common Carrier Bureau:

1. On September 5, 1990, the Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 385 to revise their dark fiber individual case basis (ICB) service offerings to terminate August 6, 1991, in compliance with a Commission Order.[1] MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 385, to which Bell Atlantic replied. Transmittal 385 is scheduled to become effective December 4, 1990.

2. MCI contends that Bell Atlantic's filing does not fully comply with the *Reconsideration Order* because Transmittal 385 fails to establish general rates for dark fiber service. MCI Petition at 1. MCI notes that it opposed a petition for limited waiver of the *Reconsideration Order* filed by Bell Atlantic which states that the carrier intends to exit the dark fiber market when its existing dark fiber ICBs terminate, and therefore Bell Atlantic should not be required to file general rates. *Id.* at 1-2. MCI reiterates its opposition to Bell Atlantic's petition for limited waiver, and states that "Bell Atlantic's intention to exit the Dark Fiber market would place it in violation of Sections 201(a) and 214 of the Communications Act." *Id.* at 2. MCI incorporates by reference its opposition to Bell Atlantic's petition for limited waiver. *Id.* at 3.

3. Bell Atlantic asserts that MCI objects only to Bell Atlantic's failure to file general dark fiber rates, not to the revisions contained in Transmittal 385. Bell Atlantic Reply at 2. Bell Atlantic observes that the Common Carrier Bureau extended the filing deadline for generally available, averaged dark fiber rates until November 1, 1990.[2] Thus, claims Bell Atlantic, there is no valid procedural claim that it was obligated to include such provisions in Transmittal 385. *Id.* Bell Atlantic also challenges MCI's arguments invoking Sections 201(a) and 214 of the Act, 47 U.S.C. §§ 201(a), 214.

4. The Common Carrier Bureau has reviewed Transmittal 385, the description and justification supporting it, and the pleadings. We conclude that no compelling argument has been presented that the tariff revisions filed by the Bell Atlantic Telephone Companies are patently unlawful so as to require rejection.

5. Accordingly, IT IS ORDERED that the petition to reject Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 385, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 4842 (1990) (*Reconsideration Order*), *further recon. pending.*

[2] On November 1, 1990, Bell Atlantic filed Transmittal No. 395 which would establish averaged, general tariff rates for dark fiber.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-462

In the Matter of

Amendment of Section 73.202(b), RM-7467
Table of Allotments,
FM Broadcast Stations.
(Banks, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: October 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Robert Anthony Fogal d/b/a Common Ground Broadcasting ("petitioner"), requesting the substitution of Channel 298C3 for Channel 298A at Banks, Oregon, and the modification of his construction permit for a new station on the Class A channel to specify the higher powered Channel 298C3. Petitioner states that it will apply for Channel 298C3, if allotted to Banks.

2. Channel 298C3 can be allotted to Banks in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in petitioner's outstanding construction permit.[1] As requested, we also propose to modify petitioner's construction permit to specify operation on Channel 298C3. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest for use of Channel 298C3 at Banks or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. Canadian concurrence in the allotment is required since Banks is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the substitution of Channel 298C3 for Channel 298A at Banks since it could enable the provision of expanded service by petitioner's station. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Banks, Oregon	298A	298C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 17, 1990** and reply comments on or before **January 2, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John H. Midlen, Jr., Esq.
Gregory H. Guillot, Esq.
Midlen & Guillot, Chartered
3238 Prospect Street, N.W.
Washington, D.C. 20007
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7 For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 298C3 at Banks are North Latitude 45-39-57 and West Longitude 123-00-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-319

In the Matter of

Amendment of Section 73.202(b), RM-7201
Table of Allotments,
FM Broadcast Stations.
(Oscoda, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 11, 1990; Released: December 26, 1990

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 3808 (1990), proposing the substitution of FM Channel 264C3 for Channel 261A at Oscoda, Michigan, and modification of the construction permit for Station WCLS, Channel 261A, accordingly. The *Notice* was issued in response to a petition filed by David C. Schaberg (petitioner). Petitioner filed untimely comments with a motion to accept.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 264C3 for Channel 261A at Oscoda in order to provide the community with an additional wide area FM broadcast service. As indicated in the *Notice*, Channel 264C3 can be allotted to Oscoda consistent with the Commission's spacing requirements at petitioner's specified site.[2] Since Oscoda is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained. We will authorize a modification of petitioner's construction permit for Station WCLS, Channel 261A, Oscoda, to specify operation on Channel 264C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 11, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Oscoda, Michigan	239C2, 264C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WCLS, Channel 261A, Oscoda, Michigan, IS MODIFIED to specify operation on Channel 264C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In view of the fact that this proceeding is uncontested, we have accepted the comments for the purpose of allowing petitioner to reaffirm his interest in applying for the channel.

[2] The coordinates for Channel 264C3 are 44-30-00 and 83-20-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-619

In the Matter of

Amendment of Section 73.202(b), RM-7565
Table of Allotments,
FM Broadcast Stations.
(Houston and Thayer, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 11, 1990; Released: December 26, 1990

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Texas County Radio, Inc. (petitioner), seeking the substitution of FM Channel 257C2 for Channel 257A at Houston, Missouri, and modification of its license for Station KUNQ(FM) to specify operation on Channel 257C2. Petitioner requests the substitution of Channel 222A for vacant Channel 257A[1] at Thayer, Missouri, to accommodate the Houston substitution. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel.

2. We believe the public interest would be served by consideration of petitioner's proposal, as it could provide a wide area FM service to Houston. A Commission engineering analysis indicates that Channel 257C2 can be allotted to Houston, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules, provided vacant Channel 257A is deleted from Thayer.[2] Channel 222A can be allotted to Thayer with a site restriction 5.6 kilometers (3.5 miles) east of the community. [3] The site restriction will prevent a short spacing to the construction permit for Station KKOZ-FM, Channel 222A, Ava, Missouri. We shall propose to modify the license for Station KUNQ(FM) to specify operation on Channel 257C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Therefore, for the reasons stated above, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Houston, Missouri	257A	257C2
Thayer, Missouri	257A	222A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 19, 1991,** and reply comments on or before **March 6, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard R. Zaragoza
John J. McVeigh
Karen M. Corr
Fisher, Wayland, Cooper and Leader
1255 23rd Street, N.W., Suite 800
Washington, D.C. 20037
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The construction permit held by Thayer Community Radio, Ltd., for Channel 257A at Thayer, Missouri was dismissed by letter on April 1, 1988 (BMPH-850917IK, BAPH-871104HH and BMPH-871214JG). Therefore, a new filing window will be opened for the channel at Thayer upon termination of this proceeding.

[2] The coordinates for Channel 257C2 at Houston are 37-06-15 and 91-50-30.

[3] The coordinates for Channel 222A at Thayer are 36-30-13 and 91-28-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-620

In the Matter of

Amendment of Section 73.202(b), RM-7577
Table of Allotments,
FM Broadcast Stations.
(Decorah, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 11, 1990; Released: December 26, 1990

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Viking Broadcasting Company (petitioner) requesting the allotment of Channel 284A to Decorah, Iowa, as the community's second local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 284A to Decorah, Iowa, since it could provide the community with its second local and first competitive FM service. Channel 284A can be allotted to Decorah in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.7 kilometers (4.1 miles) southwest to avoid a short-spacing to Station WLXR-FM, Channel 285A, La Crosse, Wisconsin.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Decorah, Iowa	263C2	263C2, 284A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 19, 1991,** and reply comments on or before **March 6, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ted R. Jacobsen
Viking Broadcasting, Inc.
P.O. Box 5821
Coralville, Iowa 52241
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 284A at Decorah are North Latitude 43-16-16 and West Longitude 91-52-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-556

In the Matter of

Amendment of Section 73.202(b), RM-6794
Table of Allotments,
FM Broadcast Stations.
(Copeland, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 7, 1990; Released: December 26, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8490 (1989), proposing the allotment of FM Channel 251C1 to Copeland, Kansas, as that community's second FM broadcast service. The *Notice* was issued in response to a petition filed by Sound Broadcasting, Inc. (petitioner). Petitioner filed comments and reply comments restating its interest in Channel 251C1. Great Plains Christian Radio, Inc. (Great Plains) filed comments and reply comments.

2. As indicated in the *Notice*, petitioner is one of two applicants for Channel 256C1 at Copeland, Kansas, and the allotment of Channel 251C1 would accommodate both applicants' desires for a channel in Copeland and avoid a comparative hearing. Petitioner requests that it be given cut-off protection and that its application (File No. 8808250C) for Channel 256C1 be amended to specify Channel 251C1. According to petitioner, Channel 278C1 could be allotted to Copeland should other parties express an interest in applying for a channel in the community.

3. Great Plains, the other applicant for Channel 256C1 at Copeland, Kansas (BPED-880823MA), filed comments in support of the allotment of Channel 251C1 to Copeland with cut-off protection for Sound Broadcasting, Inc. to allow for an amendment of the application for Channel 256C1 to specify Channel 251C1. Great Plains notes that allotment of Channel 251C1 to Copeland, with cut-off protection for Sound Broadcasting, would accommodate both applicants' desires for a channel and would avoid a comparative hearing for Channel 256C1.

4. We believe the public interest would be served by the allotment of Channel 251C1 to Copeland, Kansas, providing the community with its second FM broadcast service, and by permitting Sound Broadcasting, Inc. to amend its application to specify the new channel without loss of cut-off protection. We note that, prior to *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), it was Commission policy not to allot an additional channel to avoid a comparative hearing. In *Revision of FM Assignment Policies and Procedures*, however, the Commission modified this policy by permitting a party to pursue an additional channel in a rule making proceeding without loss of hearing rights. The Commission specifically recognized that where the additional allotment can properly be made, it would be in the public interest to promptly act on the petition for rule making and thereby avoid the cost and delay of a comparative hearing.

5. We recognize that affording cut-off protection to Sound Broadcasting, Inc. forecloses other parties from seeking the Channel 251C1 allotment at Copeland, Kansas. However, this action does not deprive any party or potential applicant of its right to comparative consideration as required by *Ashbacker Radio Corporation v. FCC*, 326 US 327 (1945). In the *Notice*, we specifically invited expressions of interest for a Class C1 allotment at Copeland.[1] No party submitted such an expression of interest in this proceeding. Affording cut-off protection in this instance does not violate *Ashbacker* where no other expression of interest in a channel has been submitted in a rule making proceeding. *See Cheyenne, Wyoming*, 62 FCC 2d 63 (1976). In view of the above, we see no public interest benefit or legal requirement in allotting Channel 251C1 to Copeland, Kansas, and then opening a filing window for general application.

6. A Commission engineering analysis indicates that Channel 251C1 can be allotted to Copeland in compliance with the Commission's minimum distance separation requirements at petitioner's specified site.[2] We shall allow Sound Broadcasting, Inc. to amend its application to specify Channel 251C1 in lieu of Channel 256C1, retaining its cut-off protection.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Copeland, Kansas	251C1, 256C1

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] As stated in the *Notice*, Channel 278C1 was available for allotment at Copeland for other expressions of interest at city reference coordinates.

[2] The coordinates for Channel 251C1 at Copeland, Kansas, are 37-22-50 and 100-27-05. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the petitioner may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-516

In the Matter of

Amendment of Section 73.202(b), RM-6927
Table of Allotments,
FM Broadcast Stations.
(Hardinsburg, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 10, 1990; Released: December 26, 1990

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of J & J Partners ("J & J"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8196 (1989), proposing the allotment of Channel 282A to Hardinsburg, Kentucky, as that community's second FM service. J & J filed comments restating its intention to apply for the channel, if allotted. James P. Gray ("Gray") filed supporting comments. HIC Broadcasting, Inc. ("HIC"), licensee of Stations WHIC(AM) and WHIC(FM), Hardinsburg, Kentucky, and Robert M. Mason ("Mason"), permittee of Channel 282A, Charlestown, Indiana, filed opposing comments. J & J filed reply comments.[1]

2. WHIC, in its comments, opposes the allotment of an additional FM service to Hardinsburg. WHIC argues that Hardinsburg has experienced a decrease in population since 1980 and has a stagnant economic environment. WHIC states that there are presently two stations licensed to Hardinsburg, and these stations compete for available advertising revenues with at least 14 other area stations. WHIC contends that the provision of an additional service could lead to inadequate revenues for the provision of quality radio service by any local licensed outlet.[2]

3. Mason argues that the allotment of Channel 282A to Hardinsburg will preclude Channel 282A at Charlestown from increasing its power to a 6 kW non-directional class A facility. [3] Mason claims that Channel 256A can instead be allotted to Hardinsburg.[4]

4. J & J, in reply comments, argues that Mason submitted no engineering data to substantiate its conclusion that Channel 256A could be allotted to Hardinsburg, Kentucky.[5] J & J contends that in any event, there is no site for the Hardinsburg facility on Channel 256A that can be allotted in compliance with the Commission's spacing requirements.

5. J & J claims that HIC's sole concern is to preclude any anti-competitive effects of a new station at Hardinsburg, alleging that HIC can maintain a "monopoly position" in Hardinsburg if it can keep competitive services out of the community. J & J argues that economic factors are no longer evaluated or considered by the Commission, citing *Policy Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989). In any event, J & J argues that contrary to HIC's assertions, Hardinsburg and Breckenridge County have made significant economic progress during the past eight years. J & J claims that new businesses and a manufacturing firm have been established and remain in existence. It notes that there are three new automobile dealerships, numerous used car dealers, three major banks, four farm equipment dealers and three drug stores in the community.

6. Based on the information filed in this proceeding, we believe the public interest would be served by allotting Channel 282A to Hardinsburg as that community's second local FM service. HIC's allegations of economic impact are not relevant to our analysis. *See Policy Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd at 641. Furthermore, there are no timely filed petitions for rule making in conflict with petitioner's proposal.

7. A staff engineering analysis has determined that Channel 282A can be allotted to Hardinsburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.0 kilometers (1.9 miles) east, in order to avoid short-spacings to Station WIKY(FM), Channel 281B, Evansville, Indiana, and the construction permit for Station WHOX, Channel 282A, Charlestown, Indiana.[6]

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Hardinsburg, Kentucky	232A, 282A

9. The window period for filing applications will open on **February 12, 1991,** and close on **March 14, 1991.**

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] After the close of the comment period, Mason filed a response to J & J's reply comments, and J & J filed a motion to strike the pleading. The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods. *See* Commission Rule 1.415(d). Mason's late filed pleading, therefore, will not be considered. Accordingly, J & J's motion to strike is moot.

[2] We note that in a separate proceeding, HIC has proposed the substitution of Channel 232C2 for Channel 232A at Hardinsburg. *See* MM Docket No. 88-315.

[3] Mason contends that a Charlestown power increase would require the concurrence of Station WZKS (formerly Station WKXN), Channel 280A, Louisville, Kentucky, and the permittee of Channel 282A at Harrison, Ohio. Mason claims that he, the Station WZKS licensee, and the Harrison permittee reached a verbal agreement regarding the above concurrence prior to the release of this *Notice*.

[4] Mason also claims that Station WZKS, Louisville, and Channel 282A, Harrison, could seek power increases to 6 kW if Channel 256A is allotted to Hardinsburg. However, neither the licensee for Station WZKS nor the permittee for the Harrison station have requested permission to operate at 6 kW. Therefore, we will not consider the possibility that these stations may, at some future time, request such a power increase in resolving this proceeding.

[5] Although Mason failed to submit the required engineering studies, the Commission performed an engineering analysis to see if Channel 256A could be allotted to Hardinsburg. The allotment would require a site restriction 16.4 kilometers (10.2 miles) from the center of Hardinsburg, in order to avoid a short-spacing to the licensed site of Station WSLM(FM), Channel 255B, Salem, Indiana. This site restriction is too great to assume compliance with the city grade coverage requirements specified in Section 73.315 of the Commission's Rules. Therefore, Channel 256A could not be allotted to Hardinsburg.

[6] The coordinates are North Latitude 37-46-32 and West Longitude 86-25-48. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-412

In the Matter of

Amendment of Section 73.202(b), RM-7289
Table of Allotments,
FM Broadcast Stations.
(Marion and Rural Retreat, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 10, 1990; Released: December 26, 1990

By the Acting Chief, Allocations Branch:

1. At the request of James K. Cornick (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 5 FCC Rcd 5540 (1990), proposing the allotment of Channel 278A to Marion, Virginia. In order to accommodate the allotment at Marion, petitioner requested the substitution of Channel 237A for Channel 276A at Rural Retreat, Virginia, and the modification of the construction permit of Highland Broadcasting Inc. ("Highland"), for Station WCRR-FM to specify the alternate Class A channel. Petitioner and Highland filed comments and petitioner filed reply comments.

2. Highland supports the substitution of Channel 237A for Channel 276A at Rural Retreat. In comments and reply comments, petitioner reiterates his intention to apply for Channel 278A, if allotted to Marion, and his willingness to reimburse Highland for reasonable and prudent expenses associated with Station WCRR-FM's channel change.

3. We believe the public interest would be served by the allotment of Channel 278A to Marion, thereby providing the community with a third local FM service. Channel 278A can be allotted to Marion in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.5 kilometers (8.4 miles) northeast to avoid a short-spacing to Station WIMZ(FM), Channel 278C, Knoxville, Tennessee. Channel 237A can be allotted to Rural Retreat in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station's WCRR(FM)'s construction permit.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Marion, Virginia	230C, 273A, 278A
Rural Retreat, Virginia	237A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit (BPH-890420MK) of Highland Broadcasting, Inc., for Station WCRR(FM), Rural Retreat, IS MODIFIED to specify operation on Channel 237A in lieu of Channel 276A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WCRR-FM's construction permit, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Station WCRR-FM's construction permit, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this *Report and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, as follows:

Highland Broadcasting, Inc. P.O. Box 700 Rural Retreat, Virginia 24368 (Permittee of Station WCRR-FM)	Peter Gutmann, Esq. Pepper & Corazzini 1776 K Street, N.W. Washington, D.C. 20006 (Counsel to Station WCRR-FM)

7. The window period for filing applications for Channel 278A at Marion, Virginia will open on **February 12, 1991,** and close on **March 14, 1991.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 278A at Marion, Virginia, are North Latitude 36-54-28 and West Longitude 81-23-25. The coordinates for Channel 237A at Rural Retreat, Virginia, are North Latitude 36-54-15 and West Longitude 81-10-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Guy Gannett Publishing Co.

Licensee of Radio Station
WZTA-FM, Miami, FL

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: December 17, 1990; Released: December 27, 1990

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $2,000 Notice of Apparent Liability (NAL) issued October 26, 1989, to Guy Gannett Publishing Co. ("Gannett"), licensee of Station WZTA-FM, Miami, Florida; and (2) Gannett's response to the NAL dated November 27, 1989.

2. The forfeiture was assessed for apparent violation of 18 U.S.C. § 1464, prohibiting the broadcast of indecent material.[1] Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act of 1934, as amended, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.

3. In a complaint to the Commission it was alleged that on or about October 27, 1987, at 6:00 a.m., WZTA-FM aired a recording of the song "Penis Envy" during the Neil Rogers Show. After listening to a tape recording of the broadcast submitted by the complainant, Commission personnel determined that the material aired by WZTA-FM (as transcribed in Attachment 1) apparently violated 18 U.S.C. § 1464.

4. Gannett admits that it aired "Penis Envy" on October 27, 1987, but it argues that the broadcast, while inconsistent with internal station policies, was not indecent under the terms of the Commission's definition. The material is not "patently offensive," argues Gannett, because "it does not describe or depict sexual intercourse but rather at most makes indirect references thereto," nor does it "include extended descriptions of sexual activities." Gannett also argues that, in the context of a (nonsexual) talk show, the song, aired at a listener's request, was simply "silly and puerile," and sexual references, if any, were "patently not made in a pandering, titillating or vulgar fashion." Moreover, states Gannett, the popularity of the Neil Rogers Show in its market, numerous letters of support from listeners, and national trends towards increasingly explicit sexual material on radio and television, demonstrate that the questionable material "wholly accords with contemporary community standards."

5. Additionally, Gannett believes that its actions with regard to the October 27, 1987, broadcast--taken well before the Commission had expressed interest in the matter and without ever having received a listener complaint about the material--were reasonable, responsible, and even commendable, and that a forfeiture is unwarranted under these circumstances. Specifically, the licensee notes that it took steps in December 1987 to prohibit the broadcast not only of "Penis Envy" (which in its opinion consisted of "mere innuendo") but also of other material it believed to be "in bad taste and against company policy." The licensee explains that it took action against what it considered "an isolated violation of corporate programming policies" within two months after the relevant broadcast rather than immediately thereafter, mainly "to give Neil Rogers some degree of programming discretion in the crafting of his new show," which had begun approximately two weeks earlier. On April 22, 1988, Gannett forbade Neil Rogers to mention "anything sexual" on his show, implementing a policy Gannett characterizes as substantially stricter than any the Commission would, or could, require, and withheld an amount from Rogers' paycheck "as disciplinary action" for his failure on April 21, 1988, to adhere to the station's indecency policy. After repeated discussions and disagreements with station management about programming policies, Neil Rogers left the employ of Gannett in October 1988.

6. Gannett further submits that "Penis Envy" is less graphic, vulgar and lewd than the material found to be indecent by other Commission decisions (citing *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698, 2700 (1987)). Gannett believes that it demonstrated reasonable judgment by relying on Commission precedent available at that time, in 1987, to determine that the song at issue was "fundamentally different" from those previously found to be indecent by the Commission. Thus, Gannett asserts, it should be entitled to rely on the assurances in *Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 933 (1987) (herein referred to as " *Infinity Reconsideration Decision* "), that "licensees demonstrating reasonable judgment have no cause to fear the imposition of unjustified sanctions." Adverse action against the licensee in this case, it protests, would underscore "the vagueness of the |Commission's| indecency policy and the capriciousness of its enforcement."

7. In *FCC v. Pacifica Foundation* (" *Pacifica* "), 438 U.S. 726 (1978), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and rejected the argument raised at that time that the Commission's definition, essentially unchanged from the one used today, was unconstitutionally vague. Furthermore, the United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict, using the same definition of indecency, the broadcast of indecent material when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC* (" *ACT I* "), 852 F.2d 1332 (D.C. Cir. 1988).[2]

8. In both *Pacifica* and *ACT I*, the definition of indecency included a "contemporary community standards for the broadcast medium" component based on the Commission's asserted expertise in ascertaining such standards for the broadcast medium. *See Infinity Reconsideration Decision*, 3 FCC Rcd at 933. These standards, used to deter-

mine compliance with the federal proscription on indecent broadcasts, cannot be determined by the popularity of particular programming among adults in a specific community; nor can such local popularity alter the risk from exposure to indecent programming incurred by children who may be in the audience.

9. Furthermore, Commission precedent available to the licensee prior to its broadcast of "Penis Envy" made it clear that innuendo may be patently offensive if it is understandable and clearly capable of a specific sexual or excretory meaning which, in context, is inescapable. *See, e.g., Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987), *recon., Infinity Reconsideration Decision*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. ACT I, supra*. Gannett's apparent contention that the material broadcast by WZTA-FM is not actionable because it is less graphic than that which the Commission has previously determined to be indecent is unavailing. Material which is indecent is not the less so, nor is it rendered immune to our enforcement authority, simply because it is less egregious than material we have heretofore found actionable.

10. Moreover, we do not agree that "Penis Envy" is "fundamentally different" from other patently offensive material that the Commission has determined to be indecent. *See, e.g., Infinity Broadcasting Corp. of Pa., supra*. In any event, the lyrics of "Penis Envy" as broadcast on WZTA-FM fit squarely within the Commission's definition of indecency. The references in that definition to "sexual or excretory activities or organs" clearly encompass more than descriptions of sexual intercourse, and always have. Further, the Commission's 1987 rulings were intended to dispel the notion that only repetitive, extended, or concentrated displays of vulgarity were subject to sanction. "Penis Envy" as broadcast by WZTA-FM contained lewd references to the male genitals and to activities involving male genitals, all graphically portrayed in a patently offensive manner. The explicitness of some of the lyrics rendered any purported innuendo in the remainder of the song clear and capable of a specific sexual or excretory meaning which, in context, was inescapable. Finally, even assuming, *arguendo*, that the material was not pandering or titillating in nature, case law has not held these characteristics to be essential to a finding of indecency under 18 U.S.C. § 1464. *See, e.g., The Regents of the University of California*, 2 FCC Rcd 2703 (1987) (remanded on other grounds in *ACT I*).

11. Accordingly, we find that WZTA's broadcast of "Penis Envy" at 6:00 a.m. on October 27, 1987, contained patently offensive references to sexual and excretory activities and organs, that its language was understandable and clearly capable of specific sexual and excretory meanings, and that, in context, the sexual and excretory import was inescapable.

12. With respect to WZTA's subsequent efforts to avoid the broadcast of indecent material, the Commission generally considers prompt and effective remedial action by a licensee as mitigative in determining the appropriate sanction level in an enforcement proceeding. In this case, however, we do not believe that the licensee's actions should significantly affect the sanction imposed. The licensee acknowledges that close to two months elapsed between the broadcast under review and the licensee's initial remedial actions.

13. Therefore, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Guy Gannett Publishing Co., licensee of Radio Station WZTA-FM, Miami, FL, FORFEIT to the United States the sum of two thousand dollars ($2,000) for its violation of Section 1464 of Title 18 of the United States Code. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENT

Penis Envy

If I had a penis, I'd wear it outside
In cafes and car lots, with pomp and with pride
If I had a penis, I'd pamper it proper
I'd stay in the tub and use me as the stopper

If I had a penis, I'd take it to parties
Stretch it and stroke it and shove it at smarties
I'd take it to pet shows and teach it to stay
I'd stuff it in turkeys on Thanksgiving Day

I'd rival my buddies in sports cars and stick shifts
I'd shower my spire with girlies and gifts
I'd peek around corners, I'd aim at my toilet
I'd poke it at foreigners, and soap it and oil it

If I had a penis, I'd run to my mother
Comb out the hair and compare it to brother
I'd lance her, I'd knight her, my hands would indulge
Pants would seem tighter and buckle and bulge

A penis to plunder, a penis to push
'Cause one in the hand it worth one in the bush
A penis to love me, a penis to share
To pick up and play with when nobody's there

I'd sit like a guy, I'd straddle the chair
I'd play with my fly, I'd beat it with care
I'd dip it in chocolate, I'd stick it in sockets
I'd stroll to the movies with hands deep in pockets
I'd stick it in vacuums on vacant verandas

Gas-guzzling Volvos and poodles and pandas
And puddles and drainpipes and doggies and ditches
Hovels (?) and potholes and bottles and bitches
Zucchinis and zebras, tomatoes, tomah-toes,
And pineapples, pumpkins, and gulches and grottos
And melons and marshmallows, gloves and gorillas
Slurpees and slippers, Chinooks and chinchillas

A penis to plunder, a penis to push,
'Cause one in the hand is worth one in the bush,
A penis to love me, a penis to share,
To pick up and play with when nobody's there

If I had a penis, I'd climb every mountain
I'd force it on females, I'd pee like a fountain,
If I had a penis, I'd still be a girl
But I'd make much more money and conquer the world.

FOOTNOTES

[1] "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

[2] We note also that in 1988 the *ACT I* court concluded that "under governing precedent, the FCC's definition of indecent broadcast material, though vagueness is inherent in it, is not constitutionally defective." *ACT I, supra*, 852 F.2d at 1344.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Application of
Congaree Broadcasters, Inc.,
For Station WSCQ-FM
West Columbia, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: November 14 1990; Released: December 26, 1990

By the Commission:

1. The Commission has before it for consideration a Memorandum Opinion and Order and Notice of Apparent Liability (*Order*) released January 10, 1990, *Congaree Broadcasters, Inc.*, 5 FCC Rcd 189 (1990), and a petition for reconsideration of the *Order* filed February 9, 1990, by Congaree Broadcasters, Inc. In the *Order*, we concluded that the licensee's failure to comply with the Commission's affirmative action rules warranted reporting conditions for three years, a forfeiture of $10,000, and a short-term renewal of the license. *See* 47 C.F.R. Sections 73.2080 (b)(3), (b)(5), (c)(2) and (c)(5). In its petition, the licensee requests that the Commission eliminate the forfeiture and grant renewal of the license for a full-term.

2. The *Order* set out a record of inadequate EEO efforts. Review of the station's renewal application and inquiry response revealed that the licensee failed to analyze its efforts to recruit, hire and promote minorities over the period under review. Specifically, review disclosed that Congaree Broadcasters did not recruit, interview or hire a Black for any of the 15 full-time upper-level positions the station filled between January 1, 1984 and January 1, 1988. In addition, the review revealed that the licensee generally did not obtain Black applicants, did not consistently contact sources likely to generate Black applicants, and did not take adequate steps to change the station's unsuccessful recruiting practices until the pendency of the license renewal. Of the 20 full-time vacancies during this period, the station hired only two Blacks for lower-level positions, one in 1984 and the other in 1987.

3. In support of its request for reconsideration, Congaree Broadcasters contends that its record of hiring minorities in three of five years[1] in "responsible" positions at a small station, and of initiating an internship program at a predominantly Black college does not support the sanctions imposed in the *Order*. Moreover, the licensee argues that the sanction imposed is inconsistent with the Commission's recent actions regarding Stations WBBE(AM)/WMGB-FM, Georgetown, Kentucky, WRGI(FM), Naples, Florida and WTCB-FM, Orangeburg, South Carolina.[2] According to Congaree Broadcasters, these stations had less effective EEO programs and more hiring opportunities than WSCQ, and despite receiving reporting conditions and forfeitures of varying amounts,[3] did not receive the additional penalty of a short-term renewal. Finally, the licensee notes that WSCQ had an application pending for assignment of its license like stations WBBE/WMGB, WRGI, and WTCB, but the short-term renewal prompted the proposed assignee to inform Congaree Broadcasters of its intent to terminate the transaction and seek liquidated damages under the purchase agreement in the amount of $50,000.[4]

4. Reconsideration is appropriate where the petitioner shows either a material error or omission in the original order. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). Applying this standard, reconsideration of the *Order* is not appropriate as discussed below. We shall, however, address the licensee's arguments to clarify the record.

5. First, Congaree Broadcasters presents no new evidence to support its contention that its EEO record does not warrant the sanctions imposed. In our *Order*, we stated that Congaree Broadcasters generally did not obtain Black applicants (the dominant minority group), did not consistently contact sources likely to generate Black applicants, and did not take adequate steps to change the station's unsuccessful recruitment practices until the pendency of the renewal application. Specifically, we noted that Congaree Broadcasters did not recruit, interview or hire a Black for any of the 15 upper-level positions during the period under review.[5] Despite characterizing lower-level positions for which it hired Blacks as "responsible" positions or mentioning that it obtained a student intern from Benedict College (one of two reported minority recruitment sources) for two months in 1988, Congaree Broadcasters fails to present any evidence that its EEO record merits resolution different from our original *Order*.

6. Further, Congaree Broadcasters fails to show any material error or omission in the *Order*.[6] In its petition for reconsideration, the licensee inappropriately focuses on limited aspects of the EEO records of Stations WSCQ, WBBE, WRGI, and WTCB, rather than studying the records as a whole. When evaluating a station's EEO efforts, the Commission considers the totality of the circumstances. Contrary to its contentions, Congaree Broadcasters' EEO efforts and that of Stations WBBE/WMGB, WRGI and WTCB differed significantly, thus warranting different sanctions and remedies. Although the degree of efforts and documentation, the number of hiring opportunities, the available minority workforce and the licensee's assessment of those efforts varied substantially, the licensees of WBBE/WMGB-FM, WRGI and WTCB--unlike WSCQ--made some effort to recruit and hire minorities from, among others, the dominant minority workforce for upper-level positions.

7. For example, the licensee of WBBE/WMGB-FM, during its three-year tenure, contacted one minority source at least three times through general mailings, in an area with a 10.5% minority labor force, and its efforts resulted in the hiring of a Black (the dominant minority) for an upper-level position. Likewise, the licensee of WRGI did contact one minority source and its efforts did result in the hiring of an Hispanic (the dominant minority) for an upper-level position during its 16 month tenure. Conversely, Congaree Broadcasters did not recruit, interview or hire a Black (the dominant minority) for any of its upper-level staff. In this regard, we note that Congaree's station is located in an area with 25.8% available minority labor force--over two times the available

minority labor force for stations WBBE/WMGB-FM and almost twice the available minority labor force for Station WRGI. Lastly, contrary to the performance of Congaree as indicated above, we also note that WTCB employed Blacks on its full-time overall and upper-level staffs throughout the license term, and did recruit and hire two Blacks for upper-level positions. Thus, the greater efforts of WBBE/WMGB-FM, WRGI & WTCB warranted lesser overall sanctions than Congaree's station.

8. In the *Order*, the Commission found that Congaree Broadcasters' record was most like that of the licensee of WSBY/WQHQ-FM in *Stations WSBY/WQHQ-FM*, 4 FCC Rcd 6160 (1989). Not only did the record of both licensees reflect a lack of significant efforts to recruit Blacks for upper-level positions in a minority labor force of similar size,[7] but both licensees' records also revealed serious EEO shortcomings which required *immediate* changes in hiring and promotion practices. The licensee of WSBY/WQHQ-FM hired no Blacks during the reporting year and the two Black employees hired by the prior licensee (one upper-level) left the station, whereas WSCQ hired Blacks for clerical positions but did not recruit or interview a Black for an upper-level position. As we stated in *WSBY*, the most efficient manner to ensure that such changes are forthcoming is to impose the prospective remedies of short-term renewal and reporting conditions. *WSBY (AM)/WQHQ-FM, supra*, at 6161.[8]

9. In the *Order*, we were also mindful of an assignment application pending.[9] However, because the short term renewal and reporting conditions serve a largely remedial function -- ensuring that the facility is operating in compliance with our EEO rules -- we saw no public interest reason not to impose these measures in a case where they are otherwise appropriate, simply because the license is being assigned. Such an approach would permit a station with defective EEO performance to be passed to different owners over a period of time without having to comply with our EEO rules.[10]

10. Finally, we note that the factors which the Commission takes into account when determining the amount of forfeiture penalty include the nature, circumstances, extent and gravity of the violations and, with regard to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require. 47 C.F.R. Section 1.80 (b)(3). After consideration of all these factors and taking into account the arguments put forth in the licensee's petition, as addressed above, we find that the original *Order* imposing a forfeiture of $10,000, short-term renewal, and reporting conditions is appropriate.

11. Accordingly, IT IS ORDERED, that the petition for reconsideration is DENIED, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503 (b), that Congaree Broadcasters of Columbia, Inc. FORFEIT to the United States the sum of ten thousand dollars ($10,000) for the wilful and continued violation of the Commission's affirmative action provisions. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, and Section 504 (a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 504 (a) as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The licensee asserts that, contrary to the Commission's conclusion, the hiring of 20 persons encompassed a period of five, not four years.

[2] *See Stations WBBE (AM)/WMGB-FM*, 4 FCC Rcd 8255 (1989); *Station WRGI (FM)*, 4 FCC Rcd 3463 (1989); *Station WTCB-FM*, 5 FCC Rcd 579 (1990).

[3] The licensee of WBBE received reporting conditions and a forfeiture of $18,000, and the licensee WTCB received reporting conditions and a $10,000 forfeiture. The licensee of WGRI received reporting conditions only.

[4] On September 1, 1989, the Commission granted the assignment of license from Congaree Broadcasters, Inc. to WSCQ, Inc. to be effective November 17, 1989, subject to the renewal of license. Congaree Broadcasters, Inc. then filed to extend the consummation date until December 17, 1989.

[5] With respect to the licensee's contention that the hiring of 20 persons encompassed a period of five, not four years, we note that in the *Order* we stated that the station's efforts failure spanned " *at least* four years." (emphasis added).

[6] We disagree with Congaree Broadcasters that the Commission failed to apply a consistent standard of review thus warranting reconsideration or renewal for a full license term. As every decision indicates, we focus on the licensee's efforts to recruit, employ and promote women *and* minorities and the licensee's ongoing assessment of its EEO efforts. Thus, factors considered include, but are not limited to, the EEO renewal program, the number of full-time hiring opportunities and the efforts made to fill those vacancies, documentation of the efforts, the licensee's assessment of those efforts, the length of the licensee's tenure, and the employment profile during the license term.

[7] WSCQ is in an area which is 24.1% black; WSBY is in an area which is 19.1% black.

[8] We imposed a lesser forfeiture on Station WSCQ than Station WSBY because the licensee of WSCQ interviewed and hired two Blacks for lower-level positions, reflecting greater overall efforts than WSBY. WSCQ filled one upper-level position with a member of a minority group not statistically significant in the local workforce.

[9] *See WSCQ, supra*, at 190 n.6.

[10] *See WSBY/WQHQ-FM, supra* at 6161.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Keymarket Communications
of Columbia, Inc., Former
Licensee of Station WTCB-FM,
Orangeburg, South Carolina
for Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: November 14, 1990; Released: December 26, 1990

By the Commission:

1. The Commission has before it for consideration a Notice of Apparent Liability (NAL) for forfeiture released January 29, 1990, against Keymarket Communications of Columbia, Inc., former licensee of WTCB-FM, Orangeburg, South Carolina (Keymarket)[1], *Keymarket Communications of Columbia, Inc.*, 5 FCC Rcd 579 (1990) (*WTCB*) and a response to the NAL received March 1, 1990, requesting elimination or reduction of the forfeiture. The NAL for $10,000 was issued for repeated failures to comply with the Commission's affirmative action provisions. 47 C.F.R. Sections 73.2080 (b)(3), (b)(5), (c)(2) and (c)(5).

2. The NAL set out a record of inadequate EEO efforts. Review of the station's renewal application and inquiry response revealed that Keymarket failed to establish and maintain regularly throughout the license term an EEO program reflecting positive and continuing efforts to recruit and hire minorities. In addition, it failed to analyze its efforts to recruit, hire and promote minorities over the period under review. Specifically, our review disclosed that Keymarket used only a general circulation newspaper and employee referrals to recruit applicants for the 11 full-time vacancies during the one-year period prior to filing the renewal application.[2] These efforts generated a total of one minority applicant who was subsequently hired. In its renewal application, Keymarket stated that it had recently added six minority recruitment sources. After the renewal application was filed, Keymarket hired three black females. However, notwithstanding these efforts made at the end of the license term, we concluded that Keymarket failed to maintain an EEO program during the full license term.

3. Keymarket responded to the NAL and requested an elimination or reduction in the forfeiture. While admitting that WTCB did not "effectively comply" with Section 73.2080 of the Commission's Rules, Keymarket contends that the Commission "ignored, minimized and mischaracterized relevant information regarding WTCB-FM's EEO record." Specifically, it asserts that "there is no basis for the Commission's conclusion" that EEO efforts were made only in the last months of the license term. Moreover, it argues that the Commission incorrectly inferred that the station was playing "catch-up" and only began hiring minorities because its renewal application was due. Except for the receptionist hired after WTCB's renewal application was filed, Keymarket maintains that "*there is no indication in any post-renewal application submission that these hires were made in the last months of the license term.*" Next, Keymarket argues that the Commission deemphasized WTCB's actual hiring record in its analysis. Keymarket points out that, while the Commission mentioned that "51% of the Orangeburg workforce is Black," the Commission "neglects to note that the Commission's traditional 'zone of reasonableness' or 'parity' would be 26%." Because the number of minority employees at WTCB fluctuated to a "high point of five in 1987, three in top four positions, equalling 20% minority employees," Keymarket states "it is clear that WTCB-FM had been effectively hiring and promoting minority employees throughout the license term." Finally, Keymarket maintains that the Commission inappropriately focused more on "process" rather than results in evaluating WTCB's EEO record.

4. Once a NAL for forfeiture has been issued, the respondent "is afforded a reasonable period of time (usually 30 days from the date of the notice)" in which to show in writing why a forfeiture penalty should not be imposed, why it should be reduced or, in the alternative, to pay the forfeiture. Any showing by the respondent to support its request must include a detailed factual statement and such documentation and affidavits as may be pertinent. 47 U.S.C. Section 1.80 (f)(3). The factors that the Commission takes into account when determining the amount of a forfeiture penalty include the nature, circumstances, extent, and gravity of the violations and, with regard to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require. 47 C.F.R. Section 1.80 (b)(3).

5. The statement that Keymarket submitted in response to the NAL does not provide a basis for reducing the forfeiture. Based on Keymarket's data, we indicated the number of minorities hired and the period during the license term when minorities were hired. The station's renewal application reflects one minority hire late during the reporting year, as well as a promotion from part-time to full-time, which was noted on the renewal application as a hire. [3] In addition, Keymarket's response indicated a minority hire after the filing of the renewal application.[4] Lastly, in its March 10, 1989 addendum, Keymarket informed the Commission of a post-term minority hire. Thus, based on the foregoing, Keymarket's post-renewal submissions clearly reflect minority hires late in, as well as after, the license term.

6. Keymarket's assertion that the Commission deemphasized WTCB's hiring record is also without merit. Although the former licensee focuses on the processing guidelines,[5] the Commission has repeatedly stated that its primary concern is the licensee's overall efforts. *Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989); *Applications of Certain Broadcast Stations Serving the Communities of Michigan/Ohio*, 3 FCC Rcd 6944 (1988); *Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988); *Catawba Valley Broadcasting Company, Inc. et. al*, 3 FCC Rcd 1913 (1988). As the Commission noted in *Florida, supra*, "[i]t would be error for a broadcaster to assume it has reached a 'safe harbor' once it meets the [processing] guidelines." *See also, Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity*

in the Broadcast Radio and Television Services, 2 FCC Rcd 3967, 3974 (1987), *petition for reconsideration pending; see* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters); *Catawba Valley, supra.* In the absence of discrimination, the principal focus of an EEO program is a licensee's overall EEO efforts which include: (1) the use of recruitment sources likely to attract qualified female and minority applicants; (2) obtaining female and minority applicants; and (3) a licensee's self-assessment of its EEO efforts. Our objective review of the station's EEO efforts, which included an analysis of hires, referral sources, and applicants revealed that Keymarket's self-assessment, which should be an ongoing process, did not take place until the last months of the license term.

7. Finally, as to Keymarket's assertion that we inappropriately focused more on "process" than results, we remind it that when evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's on-going assessment of its EEO efforts. 47 C.F.R. Section 73.2080. Even Keymarket acknowledges in its request for elimination or reduction in forfeiture that, "an EEO program which includes extensive and close contact with minority and female organizations, vigorous efforts to recruit minority candidates at every opportunity, and a recordkeeping system that will allow a station to evaluate its EEO program, is necessary to a licensee's affirmative action program." However, the data submitted by Keymarket for the reporting year failed to reflect either an adequate EEO program, or an ongoing self-assessment of EEO efforts. While Keymarket appears to have made some post-term efforts, it has not presented sufficient justification to allow us to consider these efforts. *See Rust Communications*, 73 FCC 2d 39 (1979).

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, that Keymarket Communications of Columbia, Inc. FORFEIT to the United States the sum of ten thousand dollars ($10,000) for the willful and continued violation of the Commission's affirmative action provisions. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the former licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules and Section 504(a) of the Communications Act of 1934, as amended, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On August 1, 1989, WTCB's license was conditionally assigned to Radio South Carolina, Inc. and was consummated September 19, 1989.

[2] The available labor force for Orangeburg County, South Carolina is 51.1% Black.

[3] Contrary to Keymarket's contention, this promotion was not discounted, but rather, evaluated in light of other promotions at the station.

[4] Although the licensee failed to provide the date of hire in its February 9, 1989 response, the Commission counted the additional Black hire within the license term.

[5] Keymarket mischaracterizes the station's employment profile as nearly meeting parity. Parity is 100% representation of the numbers of females and minorities in the available labor force; 50% representation of the numbers of females and minorities in the available labor force constitutes only 50% of parity.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 14, 1990

Released: December 26, 1990

Howard B. Dolgoff
Vice President/
General Manager
Station WTHZ-FM
Box 13549
Tallahassee, FL 32317

Re: Renewal of License of
Station WTHZ-FM
Tallahassee, FL

Dear Mr. Dolgoff:

This refers to your pending application for renewal of license of station WTHZ-FM, Tallahassee, Florida (File No. BRH-880928UB). The Florida State Conference of Branches of the NAACP, its branches operating in your service area, and the National Black Media Coalition filed a petition to deny on January 3, 1989. By letter dated March 6, 1989, the petitioners withdrew the petition against WTHZ-FM and requested that the Commission renew your license. Nonetheless, it is our practice in all cases to review each station's Equal Employment Opportunity (EEO) program and performance pursuant to Section 309 of the Communications Act of 1934, 47 U.S.C. Section 309. Review of the EEO record of WTHZ-FM for the license term reflects a failure to comply with the Commission's EEO Rule.

Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not present in applicant pools. The Commission also looks for any evidence of discrimination by a licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b), 73.2080 (c).

When the renewal application indicates a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When the application indicates a record of inadequate EEO efforts, the Commission may impose a variety of sanctions and remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission may designate the renewal application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending*; *see* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See also Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual Bicultural Coalition On Mass Media, Inc. v. Federal Communications Commission*, 595 F.2d 621 (D.C. Cir. 1978).

Our review of your renewal application and your response to our inquiry shows no evidence of discrimination but does reveal a record of inadequate EEO efforts. From the time you acquired the station in December 1985 through September 1988, you hired 27 persons full-time, 24 of them in upper-level positions. You indicate that, until the summer of 1988, your primary method of recruitment was the placement of advertisements in *Radio and Records*; you do not mention any other recruitment sources prior to that time. Your 1988 EEO Program Report (FCC Form 396) lists as referral sources the *Tallahassee Democrat*, Florida State University, Florida A & M University, Gadsen Vocational Technical School, the NAACP, and existing employees. Only the *Tallahassee Democrat* provided minority referrals (two) in the twelve months prior to the filing of your renewal application. You note that, due to the difficulty you have encountered in recruiting minorities, you have expanded your list of referral sources, and you submit copies of recruitment letters sent to various organizations.[1]

For most of the vacancies, the only person interviewed was the successful applicant. For the six positions for which more than one person was interviewed, you did not keep records of the number, gender, or race of the interviewees. The only minority interviewee you list is the upper-level

Hispanic you ultimately hired.[2] Of the 27 employees hired during your tenure as licensee of WTHZ, one was a minority: a Hispanic hired for an upper-level position who responded to an advertisement in *Radio and Records*.[3]

Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. Unlike *Beaumont, supra*, in which designation for an evidentiary hearing was required, the record of WTHZ does not suggest a sudden, simultaneous departure of minority employees, and no question has been raised regarding the veracity of the information submitted.

We find your station's record similar to but more egregious than that of the licensee in *Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989) (*WSBY/WQHQ*). In *WSBY/WQHQ*, we found that the licensee used minority-oriented recruitment sources for 14 of its 33 vacancies and received only two minority referrals. We also found that WSBY/WQHQ did not engage in self-assessment of its EEO program. Of 33 full-time hiring opportunities during the license term in an area where minorities constitute 20% of the labor force, WSBY/WQHQ hired no minorities. Accordingly, we granted a short-term renewal subject to reporting conditions and a $15,000 forfeiture.

Here, it does not appear that WTHZ's use of general sources was productive. Moreover, unlike the licensee of WSBY/WQHQ, you did not contact minority-oriented recruitment sources until the end of the license term.[4] We find that your failure to either modify your list of general recruitment sources or add minority sources to that list (until the last five months of the license term) reflects inadequate EEO efforts.[5] In addition, your recordkeeping was sporadic, at best, and you do not appear to have

engaged in self-assessment of your EEO efforts until the very end of the license term when you expanded your list of recruitment sources.

Further, while you maintain a slightly smaller workforce than WSBY/WQHQ, the minority labor force in your area is larger (27.6% versus 20.0%). Unlike the situation in WSBY/WQHQ, your efforts here resulted in the hiring of a minority, an upper-level Hispanic. Hispanics, however, comprise only 1.2% of the available labor force in the Tallahassee MSA while Blacks represent 25.7%. Although the Commission considers a station's overall minority employment in determining EEO compliance, we evaluate principally a station's efforts regarding the dominant minority in the labor force or non-dominant minorities that are present in the workforce in significant numbers. *Bilingual Bicultural Coalition of Mass Media, Inc. v. Federal Communications Commission*, 595 F.2d 621, 625 (D.C. Cir. 1978); *Applications for Renewal of Licenses of WBBE (AM)/WMGB-FM, Georgetown, Kentucky*, 4 FCC Rcd 8255, 8256 (1989) (*WBBE (AM)/WMGB*).

In light of the foregoing, we will grant your renewal application for less than a full-term, impose periodic reporting conditions and issue a Notice of Apparent Liability for Forfeiture as we did in *WSBY/WQHQ*. Because your overall efforts were more deficient than those of WSBY/WQHQ, however, particularly in the use of minority referral sources, we will assess an $18,000 forfeiture instead of the $15,000 forfeiture imposed in *WSBY/WQHQ*.

Accordingly, *IT IS ORDERED*, that the applications of Dolcom Broadcasting, Inc. for renewal of license for station *WTHZ-FM IS GRANTED FOR A SHORT-TERM* ending February 1, 1992, subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, Dolcom Broadcasting, Inc. is hereby advised of its apparent liability for forfeiture of $18,000 in light of its repeated failure to comply with Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, in the manner described above.

IT IS FURTHER ORDERED, that the licensee of station WTHZ-FM is directed to submit to the Commission an original and one copy of the following information with its renewal application:

(a) For the report, a list of all job vacancies during the period from the release date of this Order through October 1, 1991 indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[6]

(b) A list of employees as of the release date of this Order through October 1, 1991 by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex, and race or national origin; and

(c) Details concerning the stations' efforts to recruit Blacks for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

The report is to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment report, you may telephone the Mass Media Bureau's EEO Branch ((202) 632-7069). With respect to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this letter. Any comments concerning your ability to pay should include those financial items set forth in the attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Many of these letters were written after January 31, 1989, the last day of the license term now under review, and therefore will not be considered in this proceeding. *See Rust Communications Group, Inc.*, 73 FCC 2d 39 (1979). We note that toward the end of the license term (September, 1988 to February 1, 1989), you sent notification of specific job openings to Fort Lauderdale College, United College, Women In Communications, Inc., the Leon County Department of Job Training, Blacks in Communications, and the National Association of Black Journalists. Although these efforts may be a step in the right direction, they occurred very late in the license term.

[2] The available labor force for the Tallahassee Metropolitan Statistical Area (MSA) is 27.6% minority (25.7% Black, 1.2% Hispanic, 0.5% Asian/Pacific, 0.2% American Indian). Your 1988 Annual Employment Report (FCC Form 395-B) lists no minorities among 14 full-time employees, 13 of them in upper-level positions. You submit an amended 1988 report to reflect your hiring of a Hispanic after the end of the 1988 reporting year but before the expiration of the license term. Your 1987 report lists no minorities among 14 employees, while your 1986 report lists one Hispanic among 12 employees overall (8.3%) and 10 upper-level employees (10.0%).

[3] You also note that you have provided four hours of air-time each Sunday morning to a Black producer/host of a gospel program who is not on the station's payroll. You assert that "[t]herefore, in a sense, WTHZ has had a Black male in a top four job on staff since 1978." Unpaid persons, however, are not considered part of a station's workforce for EEO purposes.

[4] You state that you expanded your list of recruitment sources at the end of the license term to include the National Association of Black Journalists, the Latin Chamber of Commerce, the Minority Job Bank, Women in Communications, the National Association of Media Women, the National Hook-Up of Black Women, the Leon County Department of Job Training, Florida A & M University, Florida State University, United College, Fort Lauderdale College, and several broadcasting schools.

[5] Where a licensee does not obtain meaningful results from general sources and also has failed to contact minority-specific sources, questions will be raised concerning the licensee's EEO efforts. *Application of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704, 1709 n.8 (1990).

[6] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: Black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DICKEYVILLE TELEPHONE
CORPORATION,
Complainant,

v. File No. E-90-132

THE CUBA CITY TELEPHONE
EXCHANGE COMPANY,
Defendant.

ORDER

Adopted: November 17, 1990; Released: December 27, 1990

By the Chief, Formal Complaints and Investigations Branch, Common Carrier Bureau:

1. On March 27, 1990, Dickeyville Telephone Corporation (Dickeyville) filed a formal complaint against The Cuba City Telephone Exchange Company (Cuba City) alleging that certain aspects of Cuba City's plans to convert to equal access violated both Commission orders and a statutory prohibition against unjust or unreasonable discrimination, 47 U.S.C. § 202(a).

2. Subsequently, counsel for complainant has informed the Enforcement Division that a settlement has been executed by the parties and that the Dickeyville wishes to withdraw its complaint.

3. We encourage negotiations and mutually agreeable settlements in formal complaint cases. In the instant case, we are satisfied that withdrawal of the complaint and termination of the proceeding will serve the public interest by eliminating the need for litigation and the expenditure of further time and resources of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that Dickeyville's request for withdrawal of its complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-558

In re Applications of

ROGERS BROADCASTING, INC. (hereafter "RBI")	File No. BPH-890420MF
BRUCE LINDER (hereafter "Linder")	File No. BPH-890420MG
RADIO INGSTAD MINNESOTA, INC. (hereafter "Ingstad")	File No. BPH-890420MJ
ROBERT J. RAMSTORF (hereafter "Ramstorf")	File No. BPH-890420ML
ST. JAMES FM, INC.	File No. BPH-890420MM

For Construction Permit
for a New FM Station on Channel 263C2
in St. James, Minnesota

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: December 27, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* On May 4, 1990, RBI petitioned to dismiss the applications filed by Linder, Ingstad and Ramstorf. In each petition, RBI alleged that the applicants' proposed transmitting antenna sites were short-spaced to FM station KJLY(FM)'s licensed (BLH-831212AL) facilities on Channel 265A. In support of its petitions, RBI relies on the policy, stated in *Ying Hua Benns*, 3 FCC Rcd 2143 (1988), that "Commission policy protects existing licensed FM facilities from new proposals being accepted for filing until after program test for modified facilities of existing stations are authorized and/or exercised." *RBI Petition*, at paragraph 4. Further, RBI claims that "the FM Branch staff adheres to a long-standing practice of requiring waiver requests of the FM rules as a pre-condition to acceptance for filing of any proposals short-spaced to a licensed facility." *Id.*

3. In its May 25, 1990 Opposition, Linder states that "there is no such short-spacing" since the Commission modified KJLY's license to specify [Channel 283C2] in place of Channel 265A, and allocated Channel 263C2 to St. James, MN." *Linder Opposition*, at page 1, referencing the *Report and Order* in MM Docket 86-491, 4 FCC Rcd 1260 (1989), *recon. denied* 4 FCC Rcd 5652 (1989). Linder also challenged RBI's reliance on *Benns*. Specifically, Linder emphasized that *Benns* "involved short-spacing waivers to existing licensed facilities" while no such spacing problems exist in the instant matter since KJLY's license was modified to a new frequency. *Id.*, at page 2. In reply, RBI implicitly concedes Linder's point but claims that its license has not yet been modified since it has not satisfied all of the conditions specified in the *Report and Order*, *supra*, at 1261.

4. RBI's petitions are not persuasive. While 47 C.F.R. § 73.207 is ambiguous in this unusual context, the staff's established procedure provides complete protection for licensed facilities temporarily short-spaced to applications for newly allotted channels. Specifically, the Bureau conditions any future grant of the latter upon the former's commencement of program test authority on its revised facilities. *See e.g., Breckenridge Broadcasting Company*, 2 FCC Rcd 7578 (1987). This procedure insures that no new operation can commence program test authority, until the licensee begins operations pursuant to the relevant Rule Making. Further, this approach enables the staff to honor the Commission's commitment in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19937 (1985), "to bring new service to the public as expeditiously as possible." Accordingly, RBI's petition will be denied.

5. *RBI.* RBI is the licensee of KXAX(FM) in St. James, Minnesota. RBI has indicated it and its principals, Richard T. Rogers, Phillip D. Rogers, James R. Rogers and Curtis J. Rogers will divest themselves of all ownership interest in KXAX(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of RBI's application, RBI will be required to divest all interest in and sever all connections with KXAX(FM) prior to the commencement of program test authority.

6. *Linder.* Linder petitioned for leave to amend his application on October 27, 1989. The accompanying amendment was filed after August 18, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

7. *Ingstad.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Ingstad has not completed Item 4 correctly. Ingstad's application gives a post office box number as the residence address for Robert E. Ingstad and Jan Ingstad. Accordingly, Ingstad must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

8. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard

comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That the petitions to dismiss filed by RBI ARE DENIED.

12. IT IS FURTHER ORDERED, That, in the event of grant of Linder, Ingstad or Ramstorf's applications, such grant in this proceeding will be conditioned on FM Station KJLY filing a license (FCC Form 302) for Channel 283C2.

13. IT IS FURTHER ORDERED, That, in the event of grant of RBI's application, Richard T. Rogers, Phillip D. Rogers, James R. Rogers and Curtis J. Rogers will be ordered to divest themselves of all interests in and sever all connections with Station KXAX(FM), St. James, Minnesota, prior to the commencement of program test authority.

14. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Linder IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That Ingstad shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

16. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-542

In re Applications of

GRANT COUNTY BROADCASTERS (hereafter "GCB") — File No. BPH-890228MB

GRANT COUNTY BROADCASTING COMPANY (hereafter "Company") — File No. BPH-890301MB

For Construction Permit
for a New FM Station on Channel 293A
in Williamstown, Kentucky

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: December 27, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Company petitioned for leave to amend its application on February 12, 1990 and July 6, 1990. The accompanying amendments were filed after July 3, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

3. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. GCB has not completed Item 4 correctly. GCB's application gives a post office box number as the residence address for Robert R. Wallace and Larry H. Spears. Accordingly, GCB must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

4. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Company ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That GCB shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-556

In re Applications of

BRIAN E. LAMONT File No. BPH-880720MJ
(hereafter "Lamont")

ROSEMARY A. CHAUSSE File No. BPH-880721MA
(hereafter "Chausse")

For Construction Permit
for a New FM Station on Channel 275A
in Dennysville, Maine

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: December 27, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Chausse.* Chausse and her husband ("Henry Chausse"), in joint tenancy, are 25% stockholders of Radio Four Broadcasting, Inc., licensee of WQKI(AM), St. Matthews, South Carolina; WMCS(AM) and WALZ(FM) both in Machias, Maine. Chausse's interest in WALZ(FM) may represent a potential violation of the Commission's multiple ownership rules. *See,* 47 C.F.R. § 73.3555(a). Chausse has indicated the couple's intent to divest their 25% interest in Radio Four Broadcasting, Inc. and sever all connections with the stations in the event of grant of the instant application. In addition, Henry Chausse is employed as general manager of WMCS(AM) and WALZ(FM). Henry Chausse has indicated that he will terminate his employment with these stations in the event of grant of the instant application. Accordingly, in the event of grant of Chausse's application, Henry and Rosemary Chausse will be required to divest all interest in and sever all connections with WMCS(AM) and WALZ(FM) prior to the commencement of program test authority.

3. Pursuant to 47 C.F.R. §1.65, applicants are responsible "for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application." Staff review of Commission records reveals that Chausse failed to comply with 47 C.F.R. §1.65. Chausse failed to amend her response to Section II, Item 5(a), FCC Form 301, to report her interest in a broadcast application (File No. BPH-880810MQ) for Milbridge, Maine which was subsequently granted on April 27, 1990. Accordingly, an appropriate reporting issue will be specified regarding whether Chausse failed to comply with 47 C.F.R. §1.65 with respect to her other broadcast interests.

4. *Lamont.* Lamont petitioned for leave to amend his application on June 18, 1990. The accompanying amendment was filed after December 19, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Lamont has not completed Item 4 correctly. Lamont's application gives a street name as the residence address for Brian Lamont. Accordingly, Lamont must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, whether Chausse violated 47 C.F.R. §1.65 of the Commission's Rules.

2. To determine, from the evidence adduced pursuant to Issue 1 above, whether Chausse possesses the basic qualifications to be a Commission licensee.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That, in the event of grant of Chausse's application, Rosemary and Henry Chausse will be ordered to divest themselves of all interests in and sever all connections with Stations WQKI(AM), WMCS(AM) and WALZ(FM) prior to the commencement of program test authority.

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Lamont IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That Lamont shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch,

Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-541

In re Applications of

LAVERNE J. FALK (hereafter: Falk)	File No. BPH-880823MD
Patrick L. Lopeman and Robert M. Weidenbaum d/b/a WHITEWATER WIRELESS PARTNERSHIP (hereafter: Wireless)	File No. BPH-880824MQ
BETH ANN & BEVERLY J. PETERSON (hereafter: Peterson)	File No. BPH-880824MR
KINGSLEY H. MURPHY, JR. (hereafter: Murphy)	File No. BPH-880824MU
STATE LONG DISTANCE TELEPHONE COMPANY (hereafter: State)	File No. BPH-880825MO
Julie Ann Albrecht d/b/a WALWORTH RADIO COMPANY (hereafter: Walworth)	File No. BPH-880825NF
TRI-M COMMUNICATIONS, INC. (hereafter: Tri-M)	File No. BPH-880825NV
SHEBOYGAN COUNTY BROADCASTING CO., INC. (hereafter: Sheboygan)	File No. BPH-880825NZ

For Construction Permit
for a New FM Station on Channel
283A in Whitewater, Wisconsin

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: December 27, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Falk*. LaVerne J. Falk is Vice President of the Goetz Broadcasting Corporation and General Manager of WFAW and WSJY in Fort Atkinson, Wisconsin. Falk's employment in a managerial capacity at these stations represents a potential violation of the Commission's cross-interest policy. *See, e.g., Martin Lake Broadcasting Company*, 21 FCC 2d 180, 181-182 (1970). Falk has indicated her intent to terminate her relationship with Goetz Broadcasting and WFAW and WSJY in the event of grant of the referenced application. Accordingly, in the event of grant of Falk's application, Falk will be required to sever all connections with Goetz Broadcasting and WFAW and WSJY prior to the commencement of program test authority.

3. *State*. Item 4 of Section II, Form 301 (October 1986) requires an applicant to indicate the number of shares or the nature of partnership interests as well as percentage of votes. State responds to this question incorrectly, giving a total percentage of votes at 72.382 percent, considerably lower than the required 100 percent. Accordingly, State will be required to file within 30 days of the release of this Order a breakdown of the number of shares and percentage of votes by shareholder to the presiding Administrative Law Judge, or an issue will specified by the Judge.

4. *Walworth*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Walworth has filed such statement, it is deficient. Walworth has not listed specific recruitment sources. Accordingly, Walworth will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. *Tri-M*. Section III of FCC Form 301 asks each applicant to certify whether or not it has sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facility for three months without revenue. When Tri-M filed its application on August 25, 1988, it answered "yes" to that question, adding the statement: "The applicant has not, however, completed preparation of all documentation supporting its financial qualifications. The applicant will do so shortly and will report that this has been completed in an appropriate amendment." However, no such amendment was ever filed. Accordingly, a financial issue will be specified.

6. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Tri-M has not completed Item 4 correctly. Tri-M's application gives a post office box number as the residence address for Edward Mazola. Accordingly, Tri-M must submit an amendment which

gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

7. Tri-M's 60 and 70 dBu contours, as depicted in its December 19, 1988, amendment are incorrect. Our study indicates that the applicant's response in its amended Section V-B, Item 19 is identical to that in its tendered application despite a proposed transmitter move approximately 11.17 kilometers southwest of its tendered site. While this error has no effect on the acceptability of Tri-M's application, the applicant will be required to submit the appropriate amendment clarifying or correcting its response to Section V-B, Items 16 and 19 of FCC Form 301.

8. *Other Matters.* Peterson and State petitioned for leave to amend their applications on April 19, 1989, and July 20, 1990, respectively. The accompanying amendments were filed after December 19, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

9. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Walworth and Tri-M would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Tri-M is financially qualified to be a Commission licensee.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Walworth and Tri-M would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That, in the event of grant of Falk's application, Falk will be ordered to divest himself of all interests in and sever all connections with Stations WFAW and WSJY and Goetz Broadcasting prior to the commencement of program test authority.

14. IT IS FURTHER ORDERED, That State shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Walworth shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That Tri-M shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

17. IT IS FURTHER ORDERED, That Tri-M must submit the amendment described in paragraph 7 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Peterson and State ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

20. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 28, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITIONS FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

Recently, the Commission received four separate petitions for waiver of the equal access implementation requirements for independent telephone companies. Because the four petitions are similar, and for administrative ease, this public notice establishes one pleading cycle for the four petitions.

On September 19, 1990, Metamora Telephone Company (Metamora) filed a petition for a temporary waiver of the Commission's equal access rules. Metamora requests an additional twenty-one months to complete equal access conversion. Metamora states that on March 3, 1988 it received a letter from MCI Telecommunications Corporation (MCI) requesting that Metamora convert its facilities to equal access. Pursuant to Commission order, Metamora is required to complete the equal access conversion within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985). The three-year time period will end March 2, 1991. Metamora seeks an additional twenty-one months, until December 3, 1992, to complete its equal access conversion. Metamora states that a portion of the equal access conversion is complete. Metamora adds, however, that recently its owners temporarily discontinued the equal access implementation in order to shift financial and personnel resources to the expansion and modernization of another company. Metamora states that the technical personnel should resume work on the Metamora facilities by December 1990. Metamora claims that the additional twenty-one months will allow it ample time to install and test the equipment. Metamora adds that MCI does not object to the extension.

On October 15, 1990, Alhambra-Grantfork (Alhambra) filed a request for waiver seeking a one-year extension, until March 1992, to complete its equal access conversion. Alhambra states that in March 1988, it received an equal access conversion request from MCI. Under the Commission's requirements, Alhambra is required to complete the equal access conversion by March 1991. Alhambra states that it is in the process of seeking bids for new digital equipment, but Alhambra will not be able to complete the purchase and installation of the new equipment by March 1991. Alhambra states that a one-year extension will allow it to complete the conversion and ensure a smooth implementation. Alhambra also states that MCI does not object to the proposed new completion date.

Two petitions were filed on October 23, 1990, on behalf of Hamilton County Telephone Co-op (Hamilton) and Hagar TeleCom, Inc. (Hagar). According to these petitions, in March 1988, both companies received an equal access conversion request from MCI and are required to complete their equal access conversion by March 1991.

Hamilton seeks a six-month extension to implement equal access. Hamilton states that it could provide more efficient and economical equal access if it changed its present configuration of two host and five remote switches to a new one host and six remote switch configuration. According to Hamilton, its new host switch will not be delivered until March 1991. Hamilton states that an additional six months will allow it to obtain, install, and test the host new switch, thus ensuring a smooth cut-over to equal access. Hamilton adds that MCI does not object to the proposed new date for equal access implementation.

Hagar requests an additional nine months, until December 1991, to complete the equal access conversion. Hagar states that it has experienced a delay resulting from a dispute with its switch vendor. Hagar states that, although the dispute has not been completely resolved, it has ordered the upgraded equipment necessary to implement equal access. Hagar states that the equipment will be delivered in April 1991. Hagar argues that the additional nine months will be needed to install and test the equipment. Hagar anticipates equal access conversion by December 1991, and MCI does not oppose the request.

Interested parties should file comments on the petitions by *January 24, 1991*, and reply comments by *February 8, 1991*, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petitions can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH CO. File No. I-T-D-90-013

GTE HAWAIIAN TELEPHONE CO., INC.

Application for authority to discontinue the Transpacific Cable and to modify the submarine cable landing license.

ORDER AND AUTHORIZATION

Adopted: December 14, 1990; Released: December 28, 1990

By the Chief, International Facilities Division:

1. The above captioned application, filed on September 17, 1990 by American Telephone and Telegraph Company (AT&T) and GTE Hawaiian Telephone Company, Inc. (HTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to permanently discontinue operation of the Transpacific Cable System (Transpac-1) and to modify the cable landing license accordingly. The application was placed on public notice on September 26, 1990. No comments were received.

2. The Transpac-1 cable system connects Hawaii, Midway Island, Wake Island, Guam and Japan. Segment one consists of the cable station at Honshu Island, Japan. Segment two consists of the submarine cable and repeaters between Guam and Japan. Segment three consists of the submarine cable between Guam and Hawaii, via Wake and Midway Islands, together with associated cable station equipment at Guam, Wake, Midway and Hawaii. Segment four consists of the four cable stations at Guam (4A), Wake (4B), Midway (4C) and Hawaii (4D). The Transpac-1 cable system was authorized by *Order and Authorization* released October 4, 1961 (File No. P-C-4814). The Cable Landing License was also issued on October 4, 1961 (File No. S-C-L-24). The cable system currently has a capacity of 138 voice-grade circuits between Guam and Japan and 142 voice-grade circuits between Guam and Hawaii. The cable is jointly owned by AT&T, HTC, and KDD of Japan. The cable has been in service since June 19, 1964, exceeding its design life by more than a year. The applicants state that, upon deactivation of the Transpac-1, the service will be provided via the digital fiber optic HAW-4/Transpac-3 cable system, which has an capacity of 3780 64-Kb/s circuits between Hawaii and Japan, as well as other Transpacific cable and satellite facilities. No service will be discontinued.

3. Upon review of the application, we find that the Transpac-1 Cable System has exceeded its design life and service needs will be met by other transpacific facilities. Therefore, under these circumstances, we conclude that the permanent discontinuance of operation of the Transpac-1 Cable System (Hawaii-Japan) and the transfer of service to modern facilities can be accomplished with no discontinuance, reduction or impairment of any service to any community or part of a community now served by the Transpac-1 Cable System between Hawaii and Japan.

4. Accordingly, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of use and operation by the Applicants of the Transpac-1 Cable System (Hawaii-Japan) and the substitution of other transpacific facilities.

5. IT IS FURTHER ORDERED that application File No. I-T-D-90-013 IS GRANTED, and the Applicants are authorized to permanently retire and discontinue operation of the Transpac-1 cable system between Hawaii and Japan.

6. IT IS FURTHER ORDERED that the Cable Landing License in File No. S-C-L-24 is modified to delete the Transpac-1 Cable System, (Hawaii-Japan), and the Applicants shall notify the Commission upon discontinuance of use and operation of the Transpac-1 cable system between Hawaii and Japan.

7. Within 60 days of the release of this Order, the Applicants shall notify the Commission of the accounting treatment they intend to use in retiring the Transpac-1 Cable System between Hawaii and Japan.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS, CORP. File No. I-T-C-90-169

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of authorized common carrier service between the United States and Antigua.

ORDER AND AUTHORIZATION

Adopted: December 18, 1990; Released: December 28, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 28, 1990, by MCI Telecommunications Corp (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) and interconnecting facilities for the provision of authorized common carrier services between the U.S. and Antigua and beyond. The application was placed on public notice on September 5, 1990. No comments were received.

2. MCI is a non-dominant international carrier currently providing international services between the U.S. and the points reached via the PTAT-1 cable system. MCI is currently authorized to acquire and operate a one-half interest in three DS-3 circuits[1] in the PTAT-1 cable system for service between the U.S. and the United Kingdom, the Republic of Ireland, Bermuda and points beyond.[2] It now proposes to acquire and operate an additional one-half interest in one E-1 circuits [3] in the PTAT-1 cable. Since MCI does not currently offer services between the U.S. and Antigua, the capacity in PTAT-1 will not be used to divert any portion of its traffic from the existing common carrier facilities.

3. The Commission stated in its *Private Submarine Cable Decision* [4] that it would require common carriers wishing to acquire capacity in the PTAT-1 cable system to file applications pursuant to Section 214 of the Communications Act.[5] In this context, we find that MCI's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[6] Furthermore, we find that MCI's application does not raise any economic impact issues.[7]

4. Upon consideration of the application, IT IS HEREBY CERTIFIED that the public convenience and necessity require the provision of direct service between the U.S. and Antigua by MCI.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-169 IS GRANTED, and MCI is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in one E-1 circuit in the PTAT-1 cable between the cablehead at Manasquan, New Jersey and the cablehead in Bermuda;

b. acquire, on an IRU basis, a one-half interest in and operate one E-1 circuit in the Caribbean Atlantic Cable System (CARAC) between Bermuda and Tortola;

c. acquire, on an IRU basis, a one-half interest in and operate one E-1 circuit in the Digital Eastern Caribbean Microwave System (DECMS) between Tortola and Antigua;

d. lease and operate necessary connecting facilities between the CARAC cablehead and DECMS in Tortola;

e. acquire and operate necessary domestic connecting facilities; and

f. utilize said facilities to provide MCI's regularly authorized services, including switched voice services, between the U.S. and Antigua, and beyond.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to Private Transatlantic Telecommunications Systems, Inc. under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] A DS-3 circuit is equivalent to a capacity of 45 megabits per second (Mbps).

[2] *See* CICI, Inc. *et al.* 4 FCC Rcd 6622 (1989) and *MCI International, Inc.*, 4 FCC Rcd 8446 (1989), 5 FCC Rcd 453 (1990) and 5 FCC Rcd 1929 (1990).

[3] An E-1 circuit is equivalent to a capacity of 2.048 Mbps.

[4] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[5] This requirement was restated in the *International Competitive Carrier* decision in which the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *Interna-*

tional Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[6] The Commission places no special burdens on any carrier making an application for private cable capacity. *See Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables,* File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[7] The Commission stated that it has authority under the public interest mandate of Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Telemarketing Communications of South Central Indiana, Inc. d/b/a One Call, Transferor

File No. I-T-C-90-159-TC

and

One Call Communications, Inc. Transferee,

Application for Authority to Assign International Resale Authorization of Telemarketing Communications of South Central Indiana, Inc. d/b/a One Call

MEMORANDUM, OPINION, AND ORDER

Adopted: December 18, 1990; Released: December 28, 1990

By the Chief, International Facilities Division:

1. On August 3, 1990, Telemarketing Communications of South Central Indiana, Inc. d/b/a One Call (TMC/SCI) and One Call Communications, Inc. (One Call) filed an application requesting authority, *nunc pro tunc*, pursuant to Section 214 of the Communicatiions Act, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, to assign the Section 214 international resale authorization of TMC/SCI to One Call in connection with the acquisition of TMC/SCI's assets by One Call. The parties state that they have inadvertently consummated the transaction without first seeking Commission consent. The application was placed on public notice on August 15, 1990. No comments were received.

2. The parties state that TMC/SCI was an Indiana corporation that provided resold international message telecommunications services (IMTS) to international locations by reselling the switched voice services of AT&T, MCI, SBS, and US Sprint.[1] TMC/SCI operated under the streamlined regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*,[2] and had a tariff at the Commission setting forth the rates, terms and conditions of its resold IMTS. TMC/SCI also operated as a non-dominant domestic carrier in accordance with the Commission's regulatory forbearance policies adopted in *Competitive Carrier*. [3]

3. One Call is also an Indiana corporation and has been providing resold IMTS[4] subject to the streamlined requirements established in *International Competitive Carrier Policies* and domestic interstate service subject to regulatory forbearance under the Commission's *Competitive Carrier* decision.

4. TMC/SCI and One Call state that neither is directly or indirectly controlled by aliens or a foreign telecommunications entity; nor is any principal shareholder an alien. They also say that none of their directors are aliens or employees, agents or representatives of foreign telecommunications entities. The parties therefore maintain that after the proposed transaction, One Call will continue to be subject to streamlined regulatory requirements for non-dominant international telecommunications carriers.

5. TMC/SCI and One Call state that on August 31, 1989, they entered into an agreement to sell all of TMC/SCI's assets to One Call. According to the parties, TMC would also transfer all of its customer accounts to One Call upon completion of the asset purchase. All calls dialed by TMC/SCI customers would be rerouted by TMC/SCI's switch to a One Call switch, which would relay the calls to the appropriate facilities-based carrier. The parties state that the transaction was virtually transparent to TMC/SCI's customers because TMC/SCI already provided service under the name One Call pursuant to a licensing agreement. On September 1, 1989, TMC/SCI and One Call consummated the asset purchase, on a provisional basis, conditioned upon receiving all required regulatory approvals. All TMC/SCI customers are now being served by One Call under the rates, terms, and conditions set forth in the One Call tariff on file at the Commission. The parties did not seek advice concerning Commission requirements, and they state that they only recently learned of the Commission's requirement for prior approval. Thus, they now seek authority *nunc pro tunc* for the assignment.

6. The applicants state that the proposed transaction was intended to create a stronger, more competitive provider of high quality, low cost resold telecommunications services. They state that the purchase benefits the public interest by promoting increased competition, competitive pricing, and an increased availability of service options.

7. In addition to the above considerations, we must also address the issue of whether this transaction will inhibit competition and thereby be detrimental to the public interest. Section 7 of the Clayton Act proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[5] Under Section 11 of that statute, the Commission is empowered to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy."[6] The courts have construed this to mean the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act of 1934, as amended, "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[7] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. In the present instance, both TMC/SCI and One Call are non-dominant carriers and this proposed transaction does not appear to adversely impact the marketplace.

8. In view of the foregoing, we conclude that TMC/SCI's assignment of its Section 214 authorization to provide international switched voice resale services to One Call will serve the public interest. It will permit the creation of a stronger, more competitive provider of low cost resold telecommunications services. This authorization is without prejudice to any further action the Commission might take with respect to One Call's acquisition of TMC/SCI's assets and customer accounts without appropriate authorization.

9. Accordingly, IT IS ORDERED that the application of Telemarketing Communications of South Central Indiana, Inc. d/b/a One Call and One Call Communications, Inc., File No. I-T-C-90-159-TC, IS GRANTED and Telemarketing Communications of South Central Indiana, Inc. d/b/a One Call is authorized to assign the Section 214 authorization in File No. I-T-C-87-095 to One Call Communications, Inc.

10. IT IS FURTHER ORDERED that the One Call shall maintain its tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

11. IT IS FURTHER ORDERED that One Call shall file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61 (October 1, 1989).

12. IT IS FURTHER ORDERED that One Call is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T Communications Tariff F.C.C. Nos. 1 and 2, MCI Tariff F.C.C. No. 1, SBS Tariff F.C.C. No. 4, and US Sprint Tariff F.C.C. Nos. 1 and 2 between the U.S. and those points listed in the aforementioned tariffs in accordance with TMC/SCI's previous authorization in File No. I-T-C-87-095.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] *See Telemarketing Communications of South Central Indiana, Inc.*, File No. I-T-C-87-095, DA 87-654, released June 5, 1987.

[2] *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies*).

[3] *Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services and Facilities Authorizations Therefor*, (First Report and Order), 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); *recon.*, 93 FCC 2d 54 (1983) (hereinafter *Competitive Carrier*).

[4] *See* n.1.

[5] 15 U.S.C. § 18.

[6] 15 U.S.C. § 21.

[7] *United States v. FCC*, 652 F.2d 77, 88 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-90-170

Application for authority to acquire and operate facilities for direct service between the U.S. and Panama and El Salvador.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 18, 1990; Released: December 28, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 28, 1990 by US Sprint Communications Company Limited Partnership (US Sprint), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between the U.S. and Panama and El Salvador. The application was placed on public notice on September 5, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Panama and El Salvador by US Sprint.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-170 IS GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 24 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Panama furnished by US Sprint's correspondent in Panama (INTEL);

b. lease from AT&T and operate 24 voice-grade circuits in the Etam, West Virginia earth station;

c. lease and operate necessary connecting facilities between US Sprint's technical operating center in New York City and the international facilities authorized herein;

d. use the facilities in a, b, and c above to provide US Sprint's regularly authorized services, including switched voice services, between the U.S. and Panama and beyond;

e. lease from TELMEX in Mexico a one-half interest in and operate 60 voice-grade terrestrial circuits between the U.S.-Mexico border and the Mexico-Guatemala border;

f. lease from COMTELCA in Guatemala a one-half interest in and operate 60 voice-grade circuits in microwave facilities between the Mexico-Guatemala border and the Guatemala-El Salvador border; and

g. use the said facilities in e and f above to provide US Sprint's regularly authorized services, including switched voice service, between the U.S. and El Salvador and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between US Sprint and its correspondents in Panama and El Salvador and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH CO. — File No. I-T-C-91-015

Application for authority to operate additional satellite facilities for service to the Pacific Ocean Region and to provide direct service between the U.S. and Pacific Ocean Region points, including Macau, Midway Island and Wake Island.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 14, 1990; Released: December 28, 1990

By the Chief, International Facilities Division:

1. The captioned application, filed by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate additional satellite facilities for service to Pacific Ocean Region points and to provide direct service between the U.S. and Macau, Midway Island and Wake Island. The application was placed on public notice on October 24, 1990. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity. We also find that the present and future public convenience and necessity require the provision of direct service between the U.S. and Macau, Midway Island and Wake Island via satellite facilities.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-015 IS GRANTED, and AT&T is authorized to:

a. lease from Comsat and operate 2772 additional voice-grade satellite circuits between an appropriate earth station on the west coast of North America and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and the points listed in the Appendix hereto, furnished by AT&T's correspondents during 1991-1995; and

b. use said facilities to provide AT&T's international message telephone service (IMTS) and 800 Service-Overseas (800 Service) between the U.S. and the points listed in the Appendix hereto and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between AT&T and its correspondents in Macau, Midway Island and Wake Island, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

American Samoa
Australia
Brunei
China
Fiji
Guam
Hong Kong
Indonesia
Japan
Korea
Macau
Malaysia
Marshall Islands
Micronesia
Midway Island
New Caledonia
New Zealand
Palau
Papua New Guinea
Philippines
Saipan
Singapore
Tahiti
Taiwan
Thailand
Tonga
Wake Island
Western Samoa

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT/FTC COMMUNICATIONS, INC. File No. I-T-C-90-179

Application for authority to acquire and operate capacity in the PTAT-1 cable for the provision of authorized common carrier services between the U.S. on the one hand, and the United Kingdom and Germany, on the other hand, and beyond.

ORDER AND AUTHORIZATION

Adopted: December 20, 1990; Released: December 28, 1990

By the Chief, International Facilities Division:

1. The captioned application, filed on September 7, 1990 by TRT/FTC Communications, Inc. (TRT/FTC), requests authority pursuant to Section 214 of the Communications Act of 1934 as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S., on the one hand, and the United Kingdom and Germany, on the other hand, and beyond. The application was placed on public notice on September 19, 1990. No comments were received.

2. TRT/FTC is a non-dominant communications carrier authorized to provide common carrier services between the U.S. and the United Kingdom (U.K.) and Germany.[1] TRT/FTC is presently authorized to acquire and operate the equivalent of 16 E-1 circuits (2.048 Mbps each) in PTAT-1 for service between the U.S. and the United Kingdom.[2] It now requests three additional E-1 circuits for service between the U.S. and the United Kingdom and one E-1 circuit for service between the U.S. and Germany. TRT/FTC indicates that it will use the requested additional capacity to supplement existing facilities to accommodate continued growth in its U.S.-United Kingdom and U.S.-Germany services and to satisfy private line customers specifying PTAT-1 routing.

3. The Commission stated in its *Private Submarine Cable* decision [3] that it would require common carriers wishing to acquire capacity in PTAT- 1 to file applications pursuant to Section 214 of the Communications Act.[4] In this context, we find that TRT/FTC's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[5] Furthermore, we find that TRT/FTC's application does not raise any economic impact issues.[6]

4. Upon consideration of the application and in view of the foregoing, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-179 IS GRANTED, and TRT/FTC is authorized to:

a. acquire, on an indefeasible right of user (IRU) basis, a one-half interest in four E-1 circuits in the PTAT-1 cable between the U.S. and U.K.;[7]

b. acquire a 15-year Droit De Passage (DDP) interest in and operate one (1) E-1 half circuit in United Kingdom landline facilities between the PTAT-1 cablehead and the United Kingdom cablehead of the UK-Netherlands 12 submarine cable system;

c. acquire by administrative lease and operate one (1) E-1 half circuit in the UK-Netherlands 12 submarine cable system between the United Kingdom and the Netherlands;

d. acquire by administrative lease and operate one (1) E-1 half circuit in landline transiting facilities in the Netherlands between the UK-Netherlands 12 cablehead and the Netherlands/West Germany border.

e. acquire and operate necessary domestic connecting facilities; and

f. use the facilities to provide TRT/FTC's regularly authorized services between the U.S., on the one hand, the United Kingdom (three E-1 circuits), and Germany (one E-1 circuit), on the other hand, and beyond with the exception of France.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to Private Transatlantic Telecommunications Systems, Inc. under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] TRT/FTC recently merged with FTC Communications, Inc. (FTCC) with TRT/FTC being the surviving company. *See* letter to Pacific Telecom, Inc. dated June 20, 1990, File Nos. CSG-90-027-(5)AL and I-T-C-90-067-TC, from the Chief, International Facilities Division. In FTC Communications, Inc., 4 FCC

Rcd 5633 (Com. Car. Bur. 1989) (hereinafter *FTCC Ruling*), because of changes in its ownership structure, FTCC was reclassified as non-dominant under the provisions of International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986) (*International Competitive Carrier*). However, FTCC was determined to be a dominant carrier for the provision of all services between the U.S. and France because of an exclusive "gateway" arrangement with France Telecom for switched voice services. As a result of the merger, TRT/FTC is now deemed to be a dominant carrier for the provision of all services between the U.S. and France.

[2] *See* AT&T Co., 98 FCC 2d 440 (1984) and American Telephone and Telegraph Company, 4 FCC Rcd 1129 (Com. Car. Bur. 1988). We also note that FTCC, which has been merged into TRT/FTC, previously has been authorized to acquire circuits in the PTAT-1 cable system. *See* CICI, Inc., 4 FCC Rcd 6622 (Com. Car. Bur. 1989), FTC Communications, Inc., 5 FCC Rcd 3328 (Com. Car Bur. 1990), TRT/FTC, 5 FCC Rcd 3853 (Com. Car. Bur. 1990), and TRT/FTC Communications, Inc., DA-90-1540, released November 13, 1990, File No. I-T-C-90-108.

[3] *Tel-Optik, Ltd.*, 100 FCC 2d 1033 (1985).

[4] This requirement was restated in *International Competitive Carrier* decision, in which the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier*, 102 FCC 2d at 845.

[5] The Commission places no special burdens on any carrier making an application for private cable capacity. *See Pacific Telecom Cable, Inc., Request for Clarification of Policies Concerning Use of Independent International Cables*, File No. ISP-89-002, 4 FCC Rcd 4454 (1989) (*Independent Cable Policies*).

[6] The Commission stated in *Independent Cable Policies*, 4 FCC Rcd at 4456, that it has authority under its public interest mandate under Section 214 of the Communications Act to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.*

[7] TRT/FTC notes that it will pay the western owners of the PTAT-1 cable approximately $700,000 per E-1 circuit and in addition, will incur quarterly maintenance charges.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 19, 1990

COMMON CARRIER PUBLIC MOBILE SERVICES INFORMATION

AMENDED PROCEDURES FOR FILING APPLICATIONS FOR FREQUENCIES IN THE 470-512 MHz BANDS

CC Docket No. 87-120

On October 24, 1990, the Commission released a Public Notice (DA 90-1500), which was amended by Public Notice (Mimeo 10352, released October 26, 1990). These public notices outlined the procedures for filing applications for reassigned multiple address control frequencies in the 470-512 MHz bands.

In order that the Commission be able to readily identify these applications and their associated cities and channels, three significant modifications have been made to the previously announced procedures. These modifications are as follows:

1. Fee Code: The fee code is changed to CUU. The fee, however will remain the same ($230.00 per transmitter).

2. Call Sign: In the area reserved for the call sign on the fee form, enter the city code, a dash, and the channel code. The appropriate codes are shown below.

The codes for the cities (excluding New York City/Northeastern New Jersey for which a subsequent filing period will be established) are:

Boston	101	Los Angeles	107
Chicago	102	Miami	108
Cleveland	103	Philadelphia	109
Dallas/ Fort Worth	104	Pittsburgh	110
		San Francisco	111
Detroit	105	Washington, DC	112
Houston	106		

The Channel Code will be the appropriate UHF-TV channel designation for the group of frequencies for which the applicant wishes to be considered. This code must be entered, even if there is only one channel available in the city for which the applicant is filing.

As an example, if an applicant were filing for Channel 32 in Philadelphia, the call sign box on the fee form would read "109-32". Keep in mind that different channels are available in each city, and it is the duty of the applicant to select a channel which is available in the city in which the applicant is filing.

3. The Box number in the mailing address has been changed. The correct mailing address is:

Federal Communications Commission
Common Carrier Land Mobile (UHF)
P. O. Box 358675
Pittsburgh, PA 15251-5675

Fee forms will be utilized to enter each application in the proper group for purposes of random selection. Applications with fee forms containing an improper fee code or which have information differing from that which appears on the fee form will be defective, as will applications with fee forms containing city/channel codes which are non-existent for purposes of this filing.

Questions regarding this notice should br directed to Andy Nachby at (202) 632-6450 or Sam Gumbert at (202) 632-0914.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-368

In the Matter of

Computer III Remand Proceedings

REPORT AND ORDER

Adopted: December 13, 1990; Released: December 17, 1990

By the Commission:

1. On August 6, 1990, we issued a Notice of Proposed Rule Making in this proceeding.[1] The *Notice* addressed several issues raised by the decision of the United States Court of Appeals for the Ninth Circuit to vacate and remand three of the Commission's *Computer III* orders.[2] Limited in scope, the *Notice* focused on certain *Computer III* decisions that were not challenged in the briefs before the Court. [3] In this Order, we adopt the proposals contained in the *Notice* and therefore: (1) reinstate Open Network Architecture (ONA) obligations on the Bell Operating Companies (BOCs) and the American Telephone and Telegraph Company (AT&T);[4] (2) permit AT&T to provide collocated and noncollocated enhanced services on an integrated basis pursuant to the nonstructural safeguards adopted in *Computer III*; and (3) reaffirm certain *Computer III* decisions regarding Network Channel Terminating Equipment (NCTE).[5]

I. BACKGROUND

2. Under the *Computer II* regime, AT&T and the BOCs generally were required to offer any enhanced services through structurally separate subsidiaries.[6] In the *Computer III* proceeding,[7] the Commission permitted AT&T and the BOCs to offer enhanced services integrated with their basic service offerings, provided that those carriers complied with nonstructural safeguards designed to protect competing enhanced service providers (ESPs) from possible anticompetitive conduct. In addition, the Commission required the BOCs and AT&T to implement ONA in their provision of basic services. ONA was designed to increase opportunities for ESPs to use the regulated networks of AT&T and the BOCs.

3. The Commission determined that ONA could function as one of the nonstructural safeguards that would help prevent discrimination by the BOCs and AT&T against competing enhanced service providers. Under ONA the BOCs were required to develop plans describing how they would provide unbundled basic service "building blocks," and thereby enable ESPs to use network services in a flexible and economical manner.[8] Pending final implementation of ONA, the Commission permitted the BOCs to offer specific enhanced services on an integrated basis upon Commission approval of service-specific Comparably Efficient Interconnection (CEI) plans, which are designed to ensure that competitors have access to the underlying basic services being used by the BOCs.[9] The Commission required AT&T to implement a modified form of ONA in light of the greater competition existing in the provision of interstate interexchange basic services. Under ONA, AT&T is not required to further unbundle its basic services, but is required to file, and obtain Commission approval for, service-specific CEI plans before offering enhanced services integrated or collocated with its basic service facilities.[10]

4. The *Computer III* decisions also addressed the regulation of protocol processing, Voice Messaging Service (VMS), and NCTE. The Commission retained the *Computer II* classification of protocol processing as an enhanced service, established specific CEI/ONA requirements for protocol processing based on the general principles of the *Phase I Order*, and issued some minor clarifications of the treatment of protocol processing.[11] The Commission concluded that VMS should continue to be classified as an enhanced service. With respect to NCTE, the Commission reaffirmed its status as customer premises equipment (CPE).[12] The Commission further concluded that, subject to certain conditions, carriers should be permitted to provide on a regulated basis remote loopback testing, an NCTE function, using equipment on the customer premises on the network side of the demarcation point. The Commission also limited the "multiplexer exception"[13] to the provision of existing equipment provided under that exception, and of updated or improved versions of such equipment.[14] Finally, the Commission decided to entertain on a case-by-case basis requests for waivers to permit the offering by carriers of other NCTE functions (including multiplexing not covered by the multiplexer exception) on a regulated basis.[15]

5. On review, the *California* Court found certain Commission decisions in *Computer III* to be arbitrary and capricious. Specifically, the Court held that the Commission had not adequately justified the decision to replace structural separation with nonstructural safeguards for BOC enhanced service operations.[16] The Court also held that certain Commission preemption decisions had not been adequately justified. The Court decided to vacate the *Computer III* orders and remand the case to the Commission for further proceedings consistent with the Court's opinion.[17]

II. NOTICE OF PROPOSED RULE MAKING

6. The vacation of the *Computer III* orders generally returns the industry and the Commission to a *Computer II* regime.[18] As described in detail below, the *Notice* addressed certain *Computer III* decisions that were not challenged in the briefs before the Court, and were at most only tangentially addressed in the Court opinion.[19] The *Notice*, however, did not revisit a number of other *Computer III* decisions. Most importantly, in this proceeding we did not propose to reexamine the safeguards necessary for BOC provision of enhanced services. That issue, which was the focus of the *California* opinion, is the subject of a companion notice of proposed Rule Making on BOC safeguards.[20] In addition, the *Notice* did not reopen the questions of the regulatory status of protocol processing, VMS, and NCTE, but instead stated this Com-

mission's decision to retain the *Computer II* classifications of VMS and protocol processing as enhanced services, and NCTE as CPE.

III. DISCUSSION

A. ONA Requirements

7. The *Notice* first proposed to reinstate the ONA obligations developed in the *Computer III* and *ONA* orders on the BOCs. We tentatively concluded that we should require the BOCs to implement ONA independently of whether we ultimately permit the BOCs to provide enhanced services on an integrated basis. In this order, we adopt the tentative conclusions of the *Notice*. We believe that the reinstatement of ONA, as it has been detailed in the *Computer III* and ONA orders, will serve the public interest. We also conclude that we should require the BOCs to implement ONA regardless of our ultimate decision on the appropriate safeguards for BOC provision of enhanced services.

8. The great majority of the parties filing in this proceeding support the reimposition of ONA requirements, and state that there are no benefits to be gained from delaying implementation of ONA.[21] Some parties, however, argue that the Commission should use this proceeding to make substantial revisions to ONA.[22] We disagree. As AT&T states, the BOCs' ONA plans have been subject to intense scrutiny, and further delay in implementation is neither necessary nor appropriate.[23] The Commission has developed ONA in a meticulous fashion over the past five years based on a substantial record. In February, 1988, pursuant to the requirements of *Computer III*, the BOCs and AT&T filed ONA plans. In December, 1988, we released an order that approved the BOCs' ONA plans in substantial part but identified a number of areas to be revised. A companion order approved AT&T's ONA plan.[24] On May 19, 1989, the BOCs filed amended ONA plans. The Commission recently adopted, after extensive public debate, the *BOC ONA Amendment Order* that approved the BOCs' ONA implementation plans. We see no benefit to beginning this process again, which would further delay the achievement of the expected benefits of ONA.[25] The *California* opinion provides no reason to reconsider the fundamental direction of ONA that we so recently reaffirmed in the *BOC ONA Amendment Order*. ONA is an evolutionary process in which interested parties will continue to have an opportunity to participate. Our ONA implementation proceeding, CC Docket No. 88-2, will continue, with the next major BOC filings scheduled in April 1991. We can and will consider in that proceeding any necessary changes in ONA as the BOC networks evolve.

9. While the BOCs uniformly support the reinstatement of ONA and expeditious action on BOC structural relief, BOCs express different views on the extent to which ONA is independent of the choice of safeguards for BOC provision of enhanced services. Some BOCs do not object to reinstatement of ONA independent of our decision on safeguards, provided that the Commission moves quickly to issue a notice of proposed Rule Making proposing structural relief for the BOCs.[26] Other BOCs contend that the Commission should not, as a policy matter, or cannot, as a legal matter, impose ONA without permitting them to offer enhanced services on an integrated basis.[27]

10. The *Computer III* proceeding, in which the concept of ONA was developed, was also the proceeding in which the Commission determined that the BOCs should be permitted to provide enhanced services on an integrated basis, provided that they comply with certain nonstructural safeguards. That proceeding also established that ONA would be one of the nonstructural safeguards. Throughout the *Computer III* proceeding, because the context was the substitution of nonstructural safeguards for structural separation, the Commission concentrated on the efficacy of ONA as one of the nonstructural safeguards, rather than on the value of ONA independent of structural relief. On those few occasions on which the issue of ONA's independent value was raised, however, the Commission consistently stated that the BOCs must implement ONA, whether they provide enhanced services on an integrated basis or through separate subsidiaries.[28]

11. We take this opportunity to clarify that requiring the BOCs to implement ONA serves the public interest. Certainly ONA will serve as a critical nonstructural safeguard against anticompetitive conduct by the BOCs should we ultimately decide to permit the BOCs to provide enhanced services on an integrated basis. However, we conclude that the implementation of ONA should continue, regardless of our ultimate decision in the companion *BOC Safeguards* proceeding. A major goal of ONA is to increase opportunities for ESPs to use the BOCs' regulated networks in highly efficient ways, enabling them to expand their markets for their present services, and develop new offerings as well, all to the benefit of consumers.[29] As AICC notes, promotion of efficient use of the network is one of the primary goals of the Communications Act.[30] Therefore, we reiterate the *Computer III* conclusion that ONA produces public interest benefits separate from the benefits associated with the use of nonstructural safeguards to govern BOC provision of enhanced services.[31] We believe that the public interest will be served best if the BOCs proceed expeditiously to implement their ONA plans according to the schedules in place before the *California* decision.

12. Contrary to the arguments of some BOCs, our legal authority to require the BOCs to implement ONA is well established. Our decision to require ONA falls squarely within our general Rule Making authority to ensure that carriers subject to our jurisdiction furnish communication service upon reasonable request, in a just, reasonable, and nondiscriminatory manner, and with adequate facilities.[32] The Commission has exercised such authority in numerous analogous contexts. For example, we have established access charges for interstate access services provided to carriers and non-carriers[33] and required the BOCs to provide interconnection facilities to private line users.[34] We have also required all common carriers to permit users to interconnect privately owned equipment,[35] and local exchange carriers to provide equal access to interexchange carriers.[36]

13. NYNEX argues that in order to require ONA, the Commission must invoke its prescription powers under Section 205(a) and provide full opportunity for hearing. In the *Notice*, we stated that we were acting pursuant to Section 205, as well as other sections of the Act. As discussed above, we believe we have ample general Rule Making authority to adopt ONA without prescribing it. Nevertheless, to the extent prescription might be required, we find that failure by the BOCs to implement ONA would be an unjust and unreasonable practice, and we

order that the BOCs implement ONA according to the specific requirements developed in our ONA proceeding. We believe that use of our notice and comment Rule Making procedures fully satisfies the hearing requirement of Section 205.[37]

14. We conclude that our decision to reinstate ONA requirements on the BOCs is fully consistent with the Court's decision in *California*.[38] No party in that case challenged the lawfulness of the ONA requirement as such or argued that the adoption of ONA was arbitrary and capricious. The Court's criticism of *Computer III* focused on the adequacy of the Commission's justification for the Commission's reliance on accounting safeguards to address the perceived cross-subsidization potential associated with BOC provision of enhanced services on an integrated basis with their basic services. By contrast, the Court found that the Commission had adequately justified implementation of ONA as a nonstructural safeguard. The Court held that the record supports the Commission's finding that ONA and CEI may be effective in preventing discrimination.[39] We therefore reinstate the ONA obligations on the BOCs as established in the Commission's *Computer III* and *ONA* proceedings.[40]

15. Although all the states commenting in this proceeding support reinstatement of ONA, two states object to dual federal and state tariffing of ONA services, and argue that ONA services should be tariffed only at the state level.[41] We conclude that the Ninth Circuit's *California* decision does not require any alteration of our previous determination that the FCC and state commissions share jurisdiction over ONA services used in the provision of enhanced services. As the *Phase I Order* noted, the unbundled ONA services are basic services subject to regulation at the state and federal levels. The *BOC ONA Order* concluded that we have jurisdiction over basic services included in the ONA plans when used for interstate communications, but stated that we were mindful of the states' legitimate interests in BOC ONA basic service offerings used for intrastate communications.[42] Similarly, in the *BOC ONA Reconsideration Order*, we concluded that the federal tariffing of interstate BSEs as part of a dual jurisdictional regime over ONA services was essential to the successful implementation of ONA.[43] The *California* decision did not affect this shared jurisdiction over BOC ONA offerings used in the provision of enhanced services.[44] Because of this shared interest in regulating BOC ONA services, the *BOC ONA Order* established the 410(b) Joint Conference to foster federal/state coordination on ONA matters. We look forward to continuing to work with the states through the Joint Conference on the ongoing evolution of ONA.[45]

B. AT&T's Provision of Integrated Enhanced Services

16. Before *Computer III*, AT&T was permitted to provide enhanced services on an integrated basis using facilities not collocated with basic network facilities under the terms of the *AT & T Limited Waiver Order*. That Order used essentially the same nonstructural safeguards as applied to AT&T's integrated provision of basic services and CPE.[46] The Commission later replaced the nonstructural safeguards of the *AT&T Limited Waiver Order* with those adopted in *Computer III*.[47] The Commission there established different safeguards for AT&T and the BOCs. Because of the different competitive situation in providing interstate interexchange basic services, AT&T was not required to unbundle the basic services it used to provide enhanced services. AT&T was also permitted to offer enhanced services integrated or collocated with its basic service facilities provided that it received Commission approval of a service-specific Comparably Efficient Interconnection plan.

17. In the *Notice*, we proposed to allow AT&T to provide collocated and non-collocated enhanced services on an integrated basis pursuant to the nonstructural safeguards established in *Computer III*. We tentatively concluded that the continued regulation of AT&T's provision of enhanced services by nonstructural safeguards enhances the public interest and is consistent with the *California* opinion. The Commission's decision permitting AT&T to provide enhanced services pursuant to nonstructural safeguards was not appealed or briefed, and the *California* opinion did not question the adequacy of any nonstructural safeguards as applied to AT&T.

18. No party commenting in this proceeding objects to our tentative conclusions with regard to AT&T, and we therefore adopt our proposal to reinstate the *Computer III* regime. The *Phase I Order* found that AT&T's ability to shift costs from unregulated to regulated activities was reduced by the divestiture of AT&T's former local exchange companies and the increase in competition from other interexchange carriers.[48] That Order also found that the divestiture of its local exchange companies eliminated AT&T's ability to set discriminatory interconnection standards for local exchange or interstate access services, and that increased competition in interexchange services has given enhanced service providers alternative sources of basic services. We continue to agree with these conclusions. In addition, the application of "price cap" regulation to AT&T reduces any incentive for cross-subsidization of unregulated service offerings.[49] Finally, AT&T's ability to act anticompetitively is further reduced by the accounting safeguards developed in the *Joint Cost* proceeding[50] and the nonstructural safeguards developed in the *Computer III* and *ONA* proceedings and reinstated in this Order.

19. BellSouth argues that we should defer consideration of safeguards for AT&T's integrated provision of enhanced services until we address the issue of safeguards for the BOCs. We find that it is unnecessary and would be detrimental to the public to delay the benefits from AT&T's integrated provision of services until we have completed our proceeding on BOC safeguards.[51] Whether or not we continue structural separation for the BOCs does not affect our analysis with respect to AT&T.

20. We conclude that continuing to permit AT&T to provide enhanced services pursuant to nonstructural safeguards is consistent with the *California* opinion and the public interest.[52] We recognize that we have proposed in another proceeding to eliminate or modify certain of the *Computer III* requirements applied to AT&T.[53] Our decision to reinstitute the *Computer III* requirements for AT&T's provision of enhanced services does not reflect any judgment about our proposals to modify these requirements for AT&T. These proposals will be considered in the *Interexchange Proceeding* based on the record developed there. Accordingly, we reinstate our prior decisions in the *Computer III* and *ONA* proceedings regarding the provision of enhanced services by AT&T.

C. NCTE

21. In *Computer III*, the Commission made various changes in its regulation of NCTE. The Commission permitted carriers to provide, as part of a tariffed offering, equipment on customer premises to support functions necessary to perform loopback tests from the demarcation point. The Commission also limited the "multiplexer exception" to the provision of existing equipment provided under that exception, and to updated or improved versions of such equipment. The Commission stated that it would entertain on a case-by-case basis requests for waivers to permit the offering of other NCTE functions on a regulated basis. None of these decisions was challenged before the California Court or was implicated in the *Computer III* deficiencies found by the Court. In the *Notice*, we tentatively concluded that we should reaffirm these decisions.

22. No party commenting in this proceeding raises any objection to our reaffirmation of these *Computer III* decisions regarding NCTE. For the reasons given in the *Notice*, we reinstate our *Computer III* decisions regarding carrier provision on a regulated basis of remote loopback testing, changes to the multiplexer exception, and the NCTE waiver standard.

23. Three parties raise general concerns about the Commission's treatment of NCTE in other proceedings. BellSouth contends that our waiver process produces delays that are not in the public interest.[54] NYNEX argues that the present rules could impede carriers from implementing innovative technologies, and it suggests that we initiate a proceeding to re-examine NCTE.[55] Pactel recommends that we initiate a proceeding to revisit and clarify the multiplexer exception.[56] These issues are beyond the scope of this proceeding, and we therefore do not reach them.

D. Other Issues

24. As we stated in the *Notice*, this proceeding was established to address a limited number of *Computer III* decisions that were not challenged in the briefs before the Ninth Circuit. Three parties request that we revisit the issue of protocol processing.[57] BellSouth argues that the Commission must readdress in a Rule Making the regulatory classification of protocol processing, and that failure to do so would deny parties an opportunity for judicial review. We do not believe that the vacation of the *Computer III* decisions in *California* requires that we reopen all decisions made in that proceeding. We decided not to reexamine the classification of protocol processing in this proceeding because the Ninth Circuit's opinion, by vacating certain *Computer III* orders, had no effect on the classification of protocol processing. These *Computer III* orders vacated by the Court had merely reaffirmed the Commission's decision in *Computer II* to treat those services as enhanced. The question of an opportunity for judicial review is an issue to be determined by the Ninth Circuit, which has before it a challenge to the Commission's decision in *Computer III* to retain its regulatory classification of protocol processing as enhanced.[58] The remaining issues raised by commenting parties are beyond the limited scope of this proceeding.[59] We therefore do not address these issues in this Order.

IV. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, that the policies, rules and requirements set forth herein ARE ADOPTED, effective January 31, 1991.[60]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Comments

Ameritech Operating Companies (Ameritech)
American Telephone and Telegraph Company (AT&T)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
California Public Utilities Commission (California)
Computer and Business Equipment Manufacturers Association (CBEMA)
Independent Data Communications Manufacturers Association (IDCMA)
Iowa Utilities Board (Iowa)
Integrated Communication Systems, Inc. (ICS)
United States of Department of Justice (Justice)
MCI Telecommunications Corporation (MCI)
MessagePhone, Inc. (MessagePhone)
Michigan Public Service Commission (Michigan)
National Association of Regulatory Utility Commissioners (NARUC)
New York Department of Public Service (New York)
National Telephone Cooperative Association (NTCA)
National Telecommunications and Information Administration (NTIA)
NYNEX Telephone Companies (NYNEX)
Pacific Bell and Nevada Bell (Pactel)
Southwestern Bell Telephone Company (SWBT)
United States Telephone Association (USTA)
U S West, Inc. (US West)

Parties Filing Replies

Alarm Industry Communications Committee (AICC)
Ameritech
AT&T
Bell Atlantic
BellSouth
CompuServe Incorporated (CompuServe)
ICS
IDCMA
MCI

MessagePhone
NARUC
NYNEX
Public Utilities Commission of Ohio (Ohio)
Pactel
SWBT
US West

FOOTNOTES

[1] Computer III Remand Proceedings, 5 FCC Rcd 5242 (1990) (*Notice*).

[2] *People of the State of California v. FCC*, 905 F.2d 1217 (1990). The orders under review were: *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, CC Docket No. 85-229, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), 2 FCC Rcd 3072 (1987) (*Phase II Order*).

[3] We did not raise here the issue of the regulatory safeguards necessary to permit the BOCs to provide enhanced services. The Court reversed the Commission's decision to replace structural safeguards with nonstructural safeguards for BOC enhanced service operations, and we will address that issue in our companion notice of proposed Rule Making. *See infra*. note 20. Twenty-two parties filed comments in this proceeding, and fourteen parties filed reply comments. The parties filing comments and replies are listed in Appendix A of this Order.

[4] For an overview of the ONA requirements applicable to AT&T and the BOCs, *see generally* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1, 17-22 (1988) (*BOC ONA Order*), *reconsideration*, 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order*), *further order*, 5 FCC Rcd 3103 (1990) (*BOC ONA Amendments Order*), recon pending, *appeals pending sub. nom. California v. FCC*, No. 90-70336 (9th Cir. filed July 5, 1990), and *sub. nom. MCI v. FCC*, No. 90-1332 (D.C. Cir. filed July 5, 1990); CC Docket No. 88-2 Phase II, 4 FCC Rcd 2449 (1988) (*AT & T ONA Plan Order*).

[5] "Digital NCTE is a generic term for devices located on customers' premises that both provide an interface between transmission facilities and terminal equipment, and perform functions that support digital communications such as signal conditioning, remote loopback testing, multiplexing, and electrical surge protection." *Phase II Order*, 2 FCC Rcd at 3119 n. 494.

[6] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *modified on recon.*, 84 FCC 2d 50 (1981) (*Computer II Reconsideration*), *modified on further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration*), *aff'd sub nom. Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[7] Amendment of Sections 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (*Phase I Order*), *reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *Phase I Order* and *Phase I Reconsideration Order vacated sub nom.* California v. FCC, No. 87-7230 (9th Cir. filed June 6, 1990) *appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88- 1364 (D.C. Cir. pet. for rev. filed May 16, 1988); *Phase II Order*, CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *Phase II Order vacated sub nom.* California v. FCC, No. 87-7230 (9th Cir. filed June 6, 1990), *appeal pending sub nom.* California v. FCC, N. 88-7183 (9th Cir. filed May 13, 1988).

[8] *Phase I Order*, 104 FCC 2d at 1064, para. 214.

[9] The Commission has approved twenty-one CEI plans for the BOCs.

[10] *Phase I Reconsideration*, 2 FCC Rcd at 3042-3, paras. 45-53. Currently, AT&T has approval for six CEI plans.

[11] *Phase II Order*, 2 FCC Rcd at 3074-82, paras. 12-71; *Phase II Reconsideration Order*, 3 FCC Rcd at 1152-58, paras.11-57.

[12] The BOCs were authorized to provide NCTE pursuant to nonstructural safeguards in the *BOC CPE Structural Relief Order*. Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies, CC Docket No. 86-79, 2 FCC Rcd 143, *modified on recon.*, 3 FCC Rcd 22 (1987), *aff'd sub nom. Illinois Bell Telephone Co. V. FCC*, 883 F.2d 104 (1989).

[13] The multiplexer exception

> permits carrier provision of multiplexers on customer premises as part of a regulated service in order to facilitate provision of tariffed basic service offerings of (a) two or more communications channels to a single customer, or (b) individual channels to two or more customers.

Phase II Order, 2 FCC Rcd at 3105-06, para. 235.

[14] *See Phase II Reconsideration*, 3 FCC Rcd at 1167, para. 138.

[15] *Phase II Order*, 2 FCC Rcd at 3105-06.

[16] *California*, 905 F.2d at 1238-9.

[17] On July 23, 1990, the Common Carrier Bureau issued an interim waiver of *Computer II*, effective on the issuance of the mandate from the Ninth Circuit. *See* In the Matter of Computer III Remand Proceedings, Memorandum Opinion and Order, 5 FCC Rcd 4708 (1990). The waiver permitted AT&T to provide enhanced services on an integrated basis, permitted carriers to offer remote loopback testing on a regulated basis under the terms and conditions specified in *Computer III*, and applied the *Computer III* changes to the multiplexer exception and NCTE waiver standard. In the *Notice*, the Commission affirmed these decisions and extended the waiver until the conclusion of this proceeding. The Court issued the mandate on October 23, 1990.

[18] The U.S. Court of Appeals for the District of Columbia Circuit has held that when an agency replaces an existing rule with a new rule, and a court vacates all or part of the new rule, the effect is to reinstate the rules previously in force. *Action on Smoking and Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983).

[19] In the *Notice*, we incorporated the records from CC Docket Nos. 85-229 and 88-2 to the extent relevant to the issues raised in the *Notice*.

[20] Computer III Remand Proceedings: Bell Operating Company Safeguards, Notice of Proposed Rule Making and Order, CC Docket No. 90-623, adopted December 13, 1990.

[21] *See, e.g.*, NTCA Comments at 2; Michigan Comments at 2; AT&T Comments at 5; Ameritech Comments at 8; ICS Comments at 3; CompuServe Reply Comments at 6; Bell Atlantic Comments at 1. NTIA states that reinstating ONA would serve the public interest, and that the Court's decision does not preclude the Commission from reinstating the policies addressed in the *Notice*. *See* NTIA Comments at 3-4. Justice believes that

imposing ONA requirements on the BOCs would provide great public value and would increase competition in the enhanced services market. *See* Justice Comments at 5-6. California states that consumers and ESPs will benefit from ONA. California Comments at 1.

[22] *See* MCI Comments at 1-2; AICC Industry Reply at 6; MessagePhone Comments at 7, 11. Cf. Pactel Comments at 4, Reply Comments at 2 (arguing that we should initiate a new proceeding after the remand proceeding on structural separation to reaffirm and define our ONA principles in light of the *California* decision).

[23] AT&T Comments at 5. *See also* Ameritech Reply at 12.

[24] Pursuant to *Computer III*, AT&T was required to file a modified ONA plan. *See Phase I Reconsideration*, 2 FCC Rcd at 3042-3, paras. 49-53.

[25] *Accord* Justice Comments at 5; Bell Atlantic Reply at 1; Ameritech Reply at 12; ICS Reply Comments at 1; SWBT Reply Comments at 2; BellSouth Reply Comments at 4.

[26] Ameritech Comments at 2; Ameritech Reply Comments at 2; Bell Atlantic Comments at 2; BellSouth Reply Comments at 4.

[27] NYNEX Reply Comments at 5-6; Pactel Comments at 4; SWBT Comments at 7-8; US West Comments at ii, 2-3.

[28] *Phase I Reconsideration*, 2 FCC Rcd at 3057, para. 156; *Phase I Further Reconsideration Order*, 3 FCC Rcd at 1139, para. 33; *BOC ONA Order*, 4 FCC Rcd at 15-16, para. 14.

[29] *BOC ONA Order*, 4 FCC Rcd at 11, para 2. *See also* Justice Comments at 5; Michigan Comments at 2; CompuServe Reply Comments at 2.

[30] AICC Reply at 3. *See also BOC ONA Order*, 4 FCC Rcd at 15-16, para. 14.

[31] *See* NTIA Comments at 4 (arguing that the pro-efficiency goals of ONA are separate from structural separation). *See also* CBEMA Comments at 2; AICC Reply Comments at 3.

[32] *See* 47 U.S.C. §§ 154(i); 201-205; 214. *See also* 47 U.S.C. § 151 (empowering the Commission to regulate interstate and foreign commerce so as to make available "rapid, efficient, Nation-wide . . . communication service with adequate facilities at reasonable charges.")

[33] MTS and WATS Market Structure, *Third Report and Order*, 93 FCC 2d 241 (1983), *modified on further reconsideration*, 97 FCC 2d 682 (1983), *modified on further reconsideration*, 97 FCC 2d 834 (1984), *aff'd in principal part and remanded in part, National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *modified on further reconsideration*, 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985), *aff'd on further reconsideration*, 102 FCC 2d 849 (1985).

[34] Bell System Tariff Offering of Local Distribution Facilities For Use by Other Common Carriers, 46 FCC 2d 413 (1974), *aff'd., Bell Telephone Co. of Pennsylvania v. FCC*, 503 F. 2d 1250 (3d Cir.), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1974) (Section 201(a) of the Communications Act authorizes the FCC to require that telephone companies furnish to specialized common carriers the interconnection facilities necessary to provide private line services). *See* CompuServe Reply Comments at 5.

[35] *See, e.g., North Carolina Utilities Commission v. FCC*, 552 F. 2d 1036 (4th Cir.) (NCUC II), *cert. denied*, 374 U.S. 874 (1977) (Section 205 of the Communications Act authorizes the FCC to prescribe conditions that carriers may apply to connection of customer premises equipment to their networks).

[36] Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) (Allocation Order), *modified*, 101 FCC 2d 935 (1985); *modified on reconsideration*, 102 FCC 2d 503 (1985); Illinois Citizens Utility Board Petition for Rule Making, 2 FCC Rcd 1726 (1987); MTS and WATS Market Structure Phase III, 100 FCC 2d 860 (1985).

[37] 47 U.S.C. § 205.

[38] *Accord* NTIA Comments at 3.

[29] *California*, 905 F.2d at 1238.

[40] *See supra* notes 7 and 4.

[41] *See* Iowa Comments at 3; New York Comments at 4. *But see* Michigan Comments at 3 (supporting dual tariffing approach).

[42] *BOC ONA Order*, 4 FCC Rcd at 162, para. 309.

[43] *BOC ONA Reconsideration Order*, 5 FCC Rcd at 3089-90, paras. 43-46.

[44] By contrast, the *California* decision overturned the Commission's preemption of state regulation of intrastate carrier-provided enhanced services.

[45] Some state representatives also raise certain ONA implementation issues. Iowa states generally that dual federal/state tariffing appears to cause problems with separations and tariff enforcement. Iowa Comments at 3. NARUC similarly argues that jurisdictional separations need to be changed to reflect the impact of ONA. NARUC Comments at 6. The Section 410(b) Joint Conference investigated the possible separations effects of ONA and found that the near-term investment in new technologies often associated with ONA was relatively small. It requested the Federal/State Joint Board in CC Docket No. 80-286 to take cognizance of the information it gathered in its consideration of related issues. Any specific issues raised by the implementation of ONA in the Communications Act's regime of dual jurisdiction can be resolved as they arise.

[46] *See* Petition of AT&T for Limited and Temporary Waiver of 47 CFR Section 64.702 Regarding Its Provision of Unregulated Services Externally to the AT&T-C Network, *Memorandum Opinion and Order*, Mimeo No. 1147 (released November 27, 1985), *appl. for rev. denied*, 104 FCC 2d at 1043 n. 220.

[47] *Phase I Reconsideration*, 2 FCC Rcd at 3042-3, paras. 45-53.

[48] *Phase I Order*, 104 FCC 2d at 1005-1006, paras. 84-85.

[49] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989) *recon. pending*. Although Iowa does not object to reinstating the *Computer III* regime for AT&T, it states that price cap regulation does not reduce incentives for cross-subsidization of AT&T's enhanced services. Iowa Comments at 3. We disagree. The cap on AT&T's basic service prices helps prevent the carrier from raising rates above the cap to accommodate any costs improperly shifted from AT&T's enhanced services operations. The cap therefore helps reduce a carrier's incentive and ability to enhance profits by shifting costs from nonregulated to regulated services. Id. 4 FCC Rcd at 2924, para. 104.

[50] *See* In the Matter of Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities. Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions between Telephone Companies and their Affiliates. *Report and Order*, CC Docket No. 86-111, (*Joint Cost Order*), 2 FCC Rcd 1298 (1987), *reconsideration*, 2 FCC Rcd 6283 (1987), *aff'd Southwestern Bell v. FCC*, 896 F.2d 1378 (1990).

[51] This position is supported in Justice Comments at 6; NTIA Comments at 5.

[52] Because ONA is one of the nonstructural safeguards, our decision to permit AT&T to provide enhanced services pursuant to nonstructural safeguards has the effect of reimposing on AT&T the ONA obligations established in the *Computer III* and *ONA* orders.

[53] *See* Competition in the Interstate Interexchange Marketplace, 5 FCC Rcd 2627 (1990) (*Interexchange Proceeding*).

[54] BellSouth Comments at 5.

[55] NYNEX Comments at 4-5. *See also* Ameritech Reply Comments at 15.

[56] Pactel Comments at 8-9. *See also* Ameritech Reply at 16 (supporting Pactel's recommendation).

[57] BellSouth Comments at 7-8; ICS Comments at 7-8; Ameritech Reply Comments at 18.

[58] People of California, *et al.* v. FCC, Docket No. 88-7183 (and consolidated case) (filed May 13, 1988). The Ninth Circuit held that challenge in abeyance pending resolution of the principal *Computer III* petitions.

[59] Some parties raise issues that are more appropriately considered in our companion Rule Making examining the safeguards necessary for BOC provision of enhanced services. Bell Atlantic Comments at 2-3; Ameritech Reply Comments at 16; New York Comments at 4; US West Comments at 30; NTCA Comments at 3. The other issues raised in the comments are outside the scope of this proceeding. *See* Iowa Comments at 2; Bell Atlantic Comments at 2; Pactel Reply Comments at 3; Ameritech Reply Comments at 17; NYNEX Reply Comments at 10-11.

[60] This action is taken pursuant to Sections 1, 4(i), 4(j), 201-205, 214, 218, 220, and 403-405, of the Communications Act of 1934, 47 USC §§ 151, 154(i), 154 (j), 201-205, 214, 218, 220, and 403-405.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-267

In the Matter of

Review of the Technical
Assignment Criteria for the
AM Broadcast Service

ORDER EXTENDING TIME FOR FILING REPLY COMMENTS TO NOTICE OF PROPOSED RULE MAKING

Adopted: December 13, 1990; Released: December 14, 1990

By the Chief, Mass Media Bureau

1. On July 18, 1990, the Commission released a *Notice of Proposed Rule Making* ("NPRM") in MM Docket 87-267 that proposed to revise the AM technical standards to bring about a reduction of interference in the existing AM band and to implement the expanded AM band (1605-1705 kHz) which became available for use on July 1, 1990. The deadlines for filing comments and reply comments were, respectively, October 15, 1990 and November 14, 1990. On October 4, 1990, the Commission granted a request by the Association of Federal Communications Consulting Engineers to extend these dates to November 16, 1990, and December 17, 1990, due to the complexity of the proposals contained in the NPRM.

2. On December 10, 1990, the firm of du Treil, Lundin & Rackley, Inc. (du Treil), consulting engineers, requested an additional 30 day extension of the reply comment period. du Treil finds the 30 day reply period too restrictive for researching, copying and reviewing the comments. du Treil cites the complexity and diversity of this Rule Making proceeding, as evidenced by the comments they have already reviewed. A letter in support of the du Treil petition was filed December 11, 1990, by the firm of Cohen, Dippell and Everist, P.C., who note the importance of the Rule Making to the AM industry and the importance to the Commission of full consideration of technical comments.

3. A review by Commission staff indicates that nearly 100 comments have been filed in response to the NPRM, many of which are quite extensive in scope, and some of which contain very complex engineering analyses of the various technical issues raised in the Rule Making. We can appreciate the difficulty which parties preparing reply comments might encounter in reviewing and evaluating this material. While we are reluctant to further delay action in this proceeding, and for that reason granted only 30-day, rather than 60-day, comment and reply comment extensions in our Order of October 4, 1990, we are nevertheless persuaded that the extension now under consideration should be approved.

4. Accordingly, IT IS ORDERED THAT the request to extend the reply comment date filed by du Treil, Lundin & Rackley, Inc. is GRANTED. The date for filing reply comments in the NPRM is extended to January 17, 1991. No further extension of this date is contemplated.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 2585, 2586, 2596, and 2674

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 17, 1990; Released: December 18, 1990

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2585, 2586, 2596, and 2674 to introduce Virtual Telecommunications Network Service (VTNS) Options 69, 70, and 71, by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for Options 69, 70, and 71 are each stabilized for a three-year term. Option 70 may be extended for an additional two-year term at the same stabilized rates if the customer opts for such extension and AT&T agrees. *See* AT&T Transmittal No. 2585, Description and Justification (D&J) at 1-4; AT&T Transmittal No. 2586, D&J at 1-4; AT&T Transmittal No. 2596, D&J at 1-4. The basic charge for VTNS Option 69 is $132,700 per month, the basic charge for Option 70 is $296,225 per month, and the basic charge for Option 71 is $441,500 per month. *See* AT&T Transmittal No. 2585, D&J at 5; AT&T Transmittal No. 2586, D&J at 5; AT&T Transmittal No. 2596, D&J at 5. Transmittal Nos. 2585, 2586, 2596, and 2764 are scheduled to become effective December 22, 1990.

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate Transmittal Nos. 2585, 2586, and 2596 on October 10, 1990. MCI Telecommunications Corp. (MCI) filed a petition to reject Option 70 on October 10, 1990. AT&T filed a reply on October 19, 1990.

3. Sprint argues that AT&T has failed to demonstrate that Options 69, 70, and 71 are integrated service packages that are "unlike" AT&T's other component services. Further, Sprint contends that even if these options could qualify as integrated service packages, their rates vary without justification from other options under Tariff 12 and are thus discriminatory. Sprint Petition at 1-2. Moreover, Sprint contends that AT&T's provision of 72 individual VTNS offerings makes clear that each such offering is designed for one customer. Additionally, Sprint maintains that various specifications in the transmittals also effectively restrict each offering to one customer. Sprint further argues that the individualized pricing of VTNS options is comparable to the local exchange carriers' individual case basis (ICB) rates for DS3 service, that AT&T now has sufficient experience to cease its individualized pricing and develop general rates, and that the Commission thus should order AT&T to offer these rates under a generally available tariff, as it did in the ICB DS3 case. *Id.* at 2-4. Additionally, Sprint alleges that AT&T's projected 1990 revenue from all Tariff 12 VTNS options now exceeds $1.2 billion and likely accounts for more than 2 percent of the entire interexchange Id. at 4. Finally, Sprint alleges that AT&T's cost support for Options 69, 70, and 71 is "seriously deficient" and incorporates by reference the arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively). *Id.* at 5 & n.5.

4. MCI contends that Option 70 violates Sections 201(b) and 202(a) of the Act and the *Tariff 12 Order* [1] by containing geographic limitations on the availability of service which MCI claims make Option 70 effectively available to only one customer. MCI Petition at 2-3. Specifically, MCI states that Option 70's international data transmission capabilities (DTCs) are provided between a specific location (LATA 132, CLLI Code NYCMNYBW) and two other specific locations (the United Kingdom and Bermuda). MCI claims that other VTNS options that offer international services (including DTCs) do not contain similar limitations. *Id.* at 2. MCI notes that although technical restrictions may justify geographic limitations on availability, the Option 70 tariff does not establish that technical restrictions exist or form the basis for the geographic limitation, and AT&T does not justify the limitation on this basis in the D&J provided to support Option 70. *Id.* at 2 n.3. MCI thus argues that Option 70 should be rejected, and that anything less would constitute an unwarranted waiver of the tariffing requirement established by the *Tariff 12 Order*. *Id.* at 2.

5. AT&T contends that the rates in Options 69, 70, and 71 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered by AT&T in separate tariffs. AT&T Reply at 4-5. AT&T argues that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. AT&T contends that these costing methods satisfy the requirements of Section 61.38 of the Commission's Rules. *Id.* at 7-9 & 8 n.*****. AT&T also claims that Option 70 does not contain geographic limitations on availability. AT&T argues that a similar claim was raised in opposition to prior VTNS options and was found not to justify suspension or rejection, and that this allegation is without merit in the instant case as well. AT&T explains that the VTNS tariff merely specifies the domestic central office from which two international DTCs are provided, and that the DTCs may be extended from the specified central office to any other domestic location the customer chooses by connection to domestic DTCs. AT&T claims that this same manner of designating the availability of international services is used throughout Tariff 12 and with AT&T's other dedicated international services. AT&T contends that this structure allows for termination of the DTC either within the specified LATA or at other LATAs throughout the country and imposes no geographic limitation on availability. *Id.* at 3-4.

6. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2585, 2586, 2596, and 2674, Sprint's and MCI's petitions, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

7. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket 87-568 remand proceedings. Accordingly, Transmittal Nos. 2585, 2586, 2596, and 2674 are accepted subject to the outcome of the remand proceedings in CC Docket No. 87-568.

8. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2585, 2586, and 2596, filed by US Sprint Communications Company Limited Partnership, and the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2586, filed by MCI Telecommunications Corporation, ARE DENIED.

9. IT IS FURTHER ORDERED that Transmittal Nos. 2585, 2586, 2596, and 2674 take effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

10. IT IS FURTHER ORDERED that American Telephone and Telegraph Company is granted permission to advance the effective date of the revisions proposed in Transmittal Nos. 2585, 2586, 2596, and 2674 to December 19, 1990.

11. IT IS FURTHER ORDERED that for the above purpose, Special Permission No. 90-1313 is assigned, and Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989), *rev'd and remanded sub nom. MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 87-389

In the Matter of

Revision of Part 15 of the Rules
regarding the operation of radio
frequency devices without an
individual license - LPB *et al.*
Joint Petition for Partial
Reconsideration

MEMORANDUM, OPINION AND ORDER

Adopted: November 26, 1990; Released: December 28, 1990

By the Commission:

INTRODUCTION

1. By this action, the Commission grants in part the Joint Petition for Partial Reconsideration filed by LPB Inc., LocRad Inc., Burden Associates, and the Intercollegiate Broadcasting System, Inc., (herein "joint petitioners") requesting partial reconsideration of the *First Report and Order* (*R&O*) in this proceeding.[1] The rule changes adopted herein will relax the radio frequency (RF) field strength emission limits for low power AM communications systems, *e.g.* carrier current and "leaky cable" radio systems operating on the AM radio band. The revised limits for these systems will be the same as those specified in Section 15.7 of the rules that were in place prior to the *R&O*. We believe these limits are adequate to ensure that such equipment does not pose a significant threat of interference to authorized communications users.

BACKGROUND

2. In the *R&O*, the Commission adopted a comprehensive revision of Part 15 of the rules. These rules govern radio frequency devices that may be operated without an individual license. The objective of this revision was to encourage more effective use of the radio frequency spectrum by providing additional technical and operational flexibility in the design, manufacture and use of non-licensed devices. In addition, the Commission attempted to establish uniformity among the technical standards for various non-licensed operations while retaining, to the greatest extent possible, operations currently permitted under the rules. As part of this effort, the Commission revised the field strength limits that apply to three types of low power communications systems that operate on frequencies in the AM band:

(a) *Carrier current systems*: A carrier current system transmits radio frequency energy by conduction over the electric power lines. This type of system can be designed such that the signals are received by conduction from direct connection to the electric power lines (unintentional radiator) or the signals are received over-the-air due to radiation of the radio frequency signals from the electric power lines (intentional radiator). In the *R&O* the Commission applied new, somewhat more stringent, field strength limits to carrier current systems.[2]

(b) *Leaky cable systems*: Leaky cable systems are intentional radiators employing a coaxial cable that leaks radio frequency energy. This cable is connected to a transmitter and routed through an area for the express purpose of radiating a signal. The signal is usually received on an auto radio and is typically used to provide information at amusement parks and along roadways. The new field strength limits, which also apply to carrier current systems, are similar to the former limits for leaky cable systems. [3]

(c) *Campus radio stations*: In the *R&O*, the Commission adopted special operating provisions for radio stations operating in the AM broadcast band (525 to 1705 kHz) on the campus of a college or other educational institution. These provisions permit campus stations to operate with unlimited field strength emissions within the campus, so long as the field strength of the signal complies with emission limits at the campus boundary. In addition, campus radio systems were permitted to use any kind of antenna and were exempted from using certificated transmitters.[4]

JOINT PETITION

3. The joint petitioners market and operate low power communications systems that operate in the AM broadcast band. Typical systems include motorist advisory radio stations, aids for the hearing-impaired, drive-in churches and campus radio stations. The joint petitioners argue that, because carrier current systems rely on reception of the induction field, the new field strength limits, while identical to the old limits for carrier current systems for frequencies at the top of the AM band, are substantially reduced for frequencies at the bottom of the band. The joint petitioners state that since almost all carrier current systems operate on the lower AM broadcast frequencies, this change in the rules severely restricts the use of frequencies that operators find most acceptable and makes it significantly more difficult for carrier current systems to be established. The joint petitioners claim that their systems have operated in the AM broadcast band for decades without causing any interference to the AM broadcast service. They further claim that the record does not show any need to tighten the Part 15 technical standards.

4. The joint petitioners further state that, since leaky cable systems also operate on the lower AM frequencies and are designed to operate using the induction field, they should be subject to the same emission limits as carrier current systems. The joint petitioners are under the impression that both carrier current systems and intentional radiators employing leaky coaxial cables as antennas were previously subject to Section 15.7 of the Commission's rules.[5] They claim that measurements indicate that it is the induction field which predominates along the length of a properly terminated leaky cable. They state that both theory and measured data indicate that leaky cable and

carrier current systems behave similarly. They therefore conclude that the Commission should treat leaky cable systems the same as carrier current systems.

5. The joint petitioners are concerned that, while the new campus radio provisions in Section 15.221 contain no field strength limitations for operations within the boundary of a campus, the new field strength limits that would apply at the campus boundary would severely restrict carrier current usage at urban educational institutions. They point out that it is these urban institutions that are particularly in need of the ability to conduct carrier current operations, since educational FM frequencies are no longer available in many cities. The joint petitioners state that many large institutions house a significant percentage of the student body adjacent to the campus in large privately-owned residence halls, which are one hundred percent student-occupied. They are concerned that the campus radio provisions would not apply to such buildings and the signal levels of the campus station would be too low to be usable.

6. To address these concerns, the joint petitioners request that all low power communications devices, including both intentional and unintentional radiators, operating in the range of 525 kHz to 1705 kHz be regulated by a single rule duplicating the former Section 15.7.

7. Thirty seven parties submitted comments in response to the joint petition. In general, all the commenters supported the joint petition and restated the arguments presented by the joint petitioners. No negative comments to the joint petition were filed. A list of those filing comments is contained in Appendix A.

DISCUSSION

8. We recognize that carrier current and leaky cable systems are used to provide valuable services that often cannot easily be provided through other means. These systems allow low power, one-way communications using standard AM radio receivers. Campus radio stations have operated successfully for years using carrier current systems, and motorist advisory stations, such as those serving amusement parks, are now using leaky cable systems.

9. In the *R & O*, the Commission specified uniform field strength limits for both carrier current systems and other types of low power communications devices in order to simplify the Part 15 rules. The new limits are somewhat more stringent for the lower frequencies of the AM band than the former limits. They have the effect of significantly impeding the usability of carrier current systems. As indicated above, however, the Commission did not intend to preclude existing Part 15 operations and, in fact, considered carrier current operations in specifying the field strength limits for the 490 - 1705 MHz band.

10. Carrier current and leaky cable systems operate on a different physical principle than other wireless radio frequency communication systems. Such systems rely on the induction (or magnetic) field, which is present only in the immediate vicinity of a transmission line or cable carrying RF energy, to provide communications to receivers. As the petitioners observe, induction fields rapidly decrease in strength as distance from the transmission line is increased. Radiation fields, which are more typically used for radio communications, decrease much more slowly. Although induction fields are stronger than radiation fields at locations very near carrier current and leaky cable systems, radiation fields are stronger, and therefore more likely to cause interference, at greater distances.

11. Under our previous rules, carrier current systems were measured approximately at the distance at which the radiation field begins to exceed the induction field.[6] Under the new field strength limits, measurements of carrier current systems operating on the lower frequencies of the AM band were required to be made at substantially shorter distances; *i.e.*, distances where the induction field is stronger than the radiation field. While we did increase the field strength limits to compensate for the shorter measurement distance, we apparently did not sufficiently allow for the higher field strength of the induction field in areas very near to carrier current systems. The new field strength limits adopted in the *R&O*, therefore, significantly restrict the use of new carrier current systems. However, carrier current systems have been operated for decades under the former field strength limits without causing interference problems for AM broadcasters. Those levels were sufficient to avoid interference in the past and we believe they remain appropriate for future use. Accordingly, we are allowing carrier current systems operating in the AM band to comply with either the new limits or those which were contained in the former rules, respecified in the International Systems of Units.[7] While this change will lessen the uniformity of Part 15 emissions standards, we believe the benefits of applying the former standards in this case outweigh the advantages of uniformity.

12. We previously treated leaky cable systems in a manner similar to typical radio transmitters because, like radio transmitters, leaky cable systems could control where their antennas (leaky cables) were placed. However, because leaky cable systems operate more like carrier current systems, relying primarily on the induction field, we are granting the request to subject leaky cable systems operating in the AM broadcast band to the same field strength limits and equipment authorization requirements as carrier current systems.

13. The above rule changes will also resolve the difficulties that campus radio stations operating on lower band AM frequencies face in providing service beyond the boundaries of the institution under the new rules. In general, the rules adopted in the *R&O* were intended to permit campus radio stations greater flexibility and freedom in designing their operations. Consistent with this intent, campus radio stations will now be able to use both carrier current and leaky cable systems at the signal levels specified for carrier current systems under the previous rules to serve off-campus locations such as privately-owned residence halls.

ORDERING CLAUSES

14. In accordance with the above discussion and pursuant to the authority contained in Sections 4(i), 301, 302, 303, 304 and 307 of the Communications Act of 1934, as amended, IT IS ORDERED that the Joint Petition filed by LPB Inc., LocRad Inc., Burden Associates, and the Intercollegiate Broadcasting System, Inc., IS GRANTED to the extent indicated herein. In addition, IT IS FURTHER ORDERED that Part 15 of the Commission's Rules and Regulations IS AMENDED as set forth in Appendix B below. These rules and regulations are effective **February 14, 1991.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

COMMENTS ON LPB, INC. ET AL. JOINT PETITION FOR PARTIAL RECONSIDERATION WERE FILED BY:

Belmont Abbey College
David W. Borst
Broadcast Services for the Blind
Chabot College
Connecticut Radio Information Service
Joseph D. Coons
DeAnza Land and Leisure Corp.
In-Sight Radio
Ithaca College
Kent State University
Kep's Radio & TV
KXLU
Lancaster County Association for the Blind
Richard Mertz
Miami University
Mid Atlantic Radio Service
Midwest Radio Associates, Ltd.
New York University
Niagra University Telecommunications Center
Ohio Radio Reading Services
Panasonic
Performance Materials Corporation
Radio Information Service
Radio Information Service for Blind and Handicapped
Six Flags Great Adventure
State of Connecticut Office of Consumer Counsel
The Metropolitan Washington Ear, Inc.
The Sight Center
The University of Kansas
Thirty-Eighth Church of Christ, Scientist
Transcom
WBCX
WGMU
WHCS
WRGW
WSAM

LATE COMMENTS ON LPB, INC. ET AL. JOINT PETITION FOR PARTIAL RECONSIDERATIO.J WERE FILED BY:

The George Washington University (WRTV)

APPENDIX B

CHANGES TO THE REGULATIONS

Title 47 of the Code of Federal Regulations, Part 15, is amended as follows:

1. The authority citation for Part 15 continues to read as follows:

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. Section 15.109 is amended by revising paragraph (e) to read as follows:

Section 15.109 Radiated emission limits.

* *

Carrier current systems used as unintentional radiators or other unintentional radiators that are designed to conduct their radio frequency emissions via connecting wires or cables and that operate in the frequency range of 9 kHz to 30 MHz, including devices that deliver the radio frequency energy to transducers, such as ultrasonic devices not covered under Part 18 of this Chapter, shall comply with the radiated emission limits for intentional radiators provided in Section 15.209 for the frequency range of 9 kHz to 30 MHz. As an alternative, carrier current systems used as unintentional radiators and operating in the frequency range of 525 kHz to 1705 kHz may comply with the radiated emission limits provided in Section 15.221(a). At frequencies above 30 MHz, the provisions of paragraph (a) of this Section apply.

* * * * *

3. Section 15.207 is amended by revising paragraph (b) to read as follows:

Section 15.207 Conducted limits.

* * * * *

(b) The limit in paragraph (a) shall not apply to intentional radiators operated as carrier current systems in the frequency range of 450 kHz to 30 MHz. Such systems are subject to radiated emission limits as provided in Section 15.205 and Section 15.209, 15.221, 15.223, 15.225 or 15.227, as appropriate.

* * * * *

4. Section 15.221 is revised to read as follows:

Section 15.221 Operation in the band 525 - 1705 kHz.

(a) Carrier current systems and transmitters employing a leaky coaxial cable as the radiating antenna may operate in the band 525-1705 kHz provided the field strength levels of the radiated emissions do not exceed 15 uV/m, as measured at a distance of 47,715/(frequency in kHz) meters (equivalent to Lambda/2Pi) from the electric power line or the

coaxial cable, respectively. The field strength levels of emissions outside this band shall not exceed the general radiated emission limits in Section 15.209.

(b) As an alternative to the provisions in paragraph (a), intentional radiators used for the operation of an AM broadcast station on a college or university campus or on the campus of any other education institution may comply with the following:

(1) On the campus, the field strength of emissions appearing outside of this frequency band shall not exceed the general radiated emission limits shown in Section 15.209 as measured from the radiating source. There is no limit on the field strength of emissions appearing within this frequency band, except that the provisions of Section 15.5 continue to comply.

(2) At the perimeter of the campus, the field strength of any emissions, including those within the frequency band 525 - 1705 kHz, shall not exceed the general radiated emissions in Section 15.209.

(3) The conducted limits specified in Section 15.207 apply to the radio frequency voltage on the public utility power lines outside of the campus. Due to the large number of radio frequency devices which may be used on the campus, contributing to the conducted emissions, as an alternative to measuring conducted emissions outside of the campus, it is acceptable to demonstrate compliance with this provision by measuring each individual intentional radiator employed in the system at the point where it connects to the AC power lines.

(c) A grant of equipment authorization is not required for intentional radiators operated under the provisions of this Section. In lieu thereof, the intentional radiator shall be verified for compliance with the regulations in accordance with Subpart J of Part 2 of this Chapter. This data shall be kept on file at the location of the studio, office or control room associated with the transmitting equipment. In some cases, this may correspond to the location of the transmitting equipment.

(d) For the band 535-1705 kHz, the frequency of operation shall be chosen such that operation is not within the protected field strength contours of licensed AM stations.

FOOTNOTES

[1] *See First Report and Order*, GEN Docket No. 87-389, adopted March 30, 1989, 4 FCC Rcd 3493 (1989). Unless otherwise stated, all references to Part 15 regulations are to the rules adopted therein.

[2] Under the previous rules, the field strength of carrier current stations was specified in Section 15.7. *See* 47 CFR Section 15.7 (1988 edition). In the *R&O*, the Commission applied new limits in Sections 15.109(e) and 15.209. *See* 47 CFR Sections 15.109(e) and 15.209.

[3] Under the previous rules, the Commission treated leaky cable systems as low power communications devices subject to Section 15.111. *See* 47 CFR Section 15.111 (1988 edition). Under the new rules, they are regulated by Section 15.209. The specified maximum permitted field strength levels are the same in both the existing and previous rules. However, the Commission did, in the *R&O*, change the rules to require that signal strength measurements be made using a CISPR quasi-peak detector instead of an average detector as previously required. This measurement change resulted in a 3 to 6 dB reduction in the actual field strength limit. This change is not questioned by the petitioners.

[4] *See* 47 CFR Section 15.221.

[5] In fact, this is not the case. Leaky cable systems were subject to the former provisions of Section 15.111 of the Rules. As stated in OST Bulletin No. 63, a communication system where a wire is routed through an area and connected to a transmitter for the express purpose of radiating a signal into space is considered to be a low power communication device. *See* OST Bulletin No. 63, "Understanding FCC Rules & Regulations under Part 15 for Low Power Transmitters," December 1984.

[6] This distance is approximated by dividing the wavelength of the signal by two times the constant Pi (commonly refered to as Lambda/2Pi). The distance varies with frequency. A signal on 540 kHz has a Lambda/2Pi distance of 88 meters. A signal on 1590 kHz has a Lambda/2Pi distance of 30 meters.

[7] We note that the former rules allowed the field strength of low power AM communications systems to be measured using an average detector while the rules adopted in the *R&O* required the use of a CISPR quasi-peak detector. This measurement change may result in a 3 to 6 dB reduction in the actual field strength limit. CISPR quasi-peak measurements provide a much better indication of the potential for interference to AM broadcast stations. Accordingly, we are retaining the requirement to use a CISPR quasi-peak detector. We believe the relaxation of the field strength limits which we are adopting will provide adequate relief so that carrier current and leaky cable systems can continue to operate successfully.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT/FTC Communications, Inc. Revisions to Tariff F.C.C. Nos. 8, 9, and 11 — Transmittal Nos. 10 and 11

Graphnet, Inc. Revisions to Tariff F.C.C. No. 5 — Transmittal No. 180

ORDER

Adopted: October 31, 1990; Released: November 1, 1990

By the Chief, Common Carrier Bureau:

1. On September 17, 1990, TRT/FTC Communications, Inc.(TRT/FTC) filed Transmittal No. 10 to revise its Tariff F.C.C. Nos. 8, 9, and 11. Transmittal 10, in part, increases rates for termination of international and domestic telex traffic from other interconnected record carriers addressed to TRT/FTC's domestic tielines. On September 24, 1990, TRT/FTC filed Transmittal No. 11, which, in part, revises Transmittal 10 to increase TRT/FTC's telex access service rates to Western Union International, Inc. (WUI) from $0.69 per minute to $0.75 per minute. In both transmittals, TRT/FTC proposes to charge reciprocal rates to each customer for telex access service that are directly proportional to that customer's charge to TRT/FTC for like services. Graphnet, Inc. (Graphnet) Transmittal No. 180, also filed on September 24, 1990, similarly proposes to revise its Tariff F.C.C. No. 5 to increase charges for telex termination on its tielines. These three transmittals are all scheduled to become effective November 1, 1990. In three separate filings, WUI has petitioned the Commission to reject, or in the alternative to suspend and investigate, each of the proposed tariffs. TRT/FTC filed oppositions to WUI's petitions against Transmittals 10 and 11.[1]

2. WUI maintains that TRT/FTC's proposed rate increases violate several sections of the Communications Act. WUI Tr. 10 Opposition at 2; WUI Tr. 11 Opposition at 1. It charges that the Transmittal 10 rates discriminate among carrier customers in violation of Section 202(a) of the Act, 47 U.S.C. § 202(a). WUI Tr. 10 Opposition at 2-4. It argues that Transmittal 11's proposed rates are unreasonable under Section 201(b) of the Act, 47 U.S.C. § 201(b), since the same service would be provided to different carriers at different prices. WUI Tr. 11 Opposition at 2. WUI states that the differing rates could be considered unlawful rebates under Section 203(c) of the Act, 47 U.S.C. § 203(c). WUI Tr. 10 Opposition at 5; WUI Tr. 11 Opposition at 6-7. It declares that both transmittals violate the intent of Section 222(c) of the Act, 47 U.S.C. § 222(c), by establishing different rates for each interconnecting carrier. WUI Tr. 11 Opposition at 6.

3. WUI makes the same arguments against Graphnet's Transmittal 180, alleging that Graphnet's revisions establish unreasonable charges, practices and classifications, establish different rates for different interconnecting carriers, and constitutes a hidden refund. WUI Tr. 180 Opposition at 1. Charging that the rate increase is not based on Graphnet's costs, WUI urges the Commission to suspend the proposed tariff revisions. *Id.* at 2.

4. TRT/FTC replies that Section 202(a) prohibits only "unjust" or "unreasonable" rate discrimination, and explains that the rates in this transmittal affect bi-directional inter-carrier interconnection arrangements rather than the public. TRT/FTC Reply to WUI Tr. 10 Opposition at 3. Further, it asserts that differing rates can be equitable when the rates ensure the equal division of applicable accounting rates for termination of traffic on a vendor's telex network. *Id.* at 3-4. TRT/FTC further maintains that Section 203(c) is irrelevant since it simply prohibits collecting charges for communications services which differ from those set forth in published tariffs. *Id.* at 4. TRT/FTC adds that WUI did not attempt to make the showing required to suspend or reject a foreborne carrier's tariff filing under Section 1.773(a)(ii) of the Commission's Rules, 47 C.F.R. §1.773(a)(ii). *Id.* at 5.

5. In addition to repeating arguments from its reply to WUI's Transmittal 10 opposition, TRT/FTC states that the network termination rates under Transmittal 11 are "just and reasonable" reciprocal rates under Section 201(b) that result in an equitable norm for interconnection arrangements. TRT/FTC Reply to WUI Tr. 11 Opposition at 5. Additionally, it adds that the Record Carrier Competition Act of 1981 permits consideration of reciprocity in the setting of network termination rates. *Id.* at 6.

6. The Common Carrier Bureau has reviewed TRT/FTC's Transmittals 10 and 11, Graphnet's Transmittal 180, WUI's petitions and TRT/FTC's oppositions. We conclude that no compelling argument has been presented that the tariff revisions of TRT/FTC and Graphnet are patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject or to suspend and investigate TRT/FTC Communications Tariff F.C.C. No. 9, Transmittal Nos. 10 and 11, filed by Western Union International, Inc., ARE DENIED.

8. IT IS FURTHER ORDERED that the petition to reject or to suspend and investigate Graphnet, Inc., Tariff F.C.C. No. 5, Transmittal No. 180, filed by Western Union International, Inc., IS DENIED.

9. IT IS FURTHER ORDERED that the motion to accept a late-filed pleading filed by TRT/FTC Communications, Inc., IS DENIED.

10. IT IS FURTHER ORDERED that the late-filed reply by Graphnet, Inc., to the petition to reject or to suspend and investigate Transmittal No. 180, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] TRT/FTC also filed an opposition to Graphnet's Transmittal 180 five days late. Its petition was accompanied by a motion to accept a late-filed pleading. Graphnet also filed a reply to the WUI and TRT/FTC petitions which was five days late and unaccompanied by a motion to accept a late-filed pleading. Since neither TRT/FTC nor Graphnet demonstrated good cause for their delays, we deny TRT/FTC's motion and dismiss Graphnet's pleading.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN REPLY REFER TO:

October 22, 1990

8910-KAK

FCC 90-352
38038

Released: October 26, 1990

Roy R. Russo, Esquire
Cohn and Marks
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, DC 20036-1573

In re: KKWM(AM), Dallas, Texas
File No. BAL-900207EB

Dear Mr. Russo:

This is in reference to the above-captioned application for assignment of license of station KKWM(AM), Dallas, Texas, from Anchor Media, Ltd., to KLIF, Co. ("KLIF"). KLIF is also the licensee of KLIF(AM), Dallas, Texas, and grant of the instant application will result in a violation of Section 73.3555(a)(1) of the Commission's Rules due to the overlap of the 5 mV/m service contours of both stations.[1] Accordingly, you have requested a six month waiver of Section 73.3555(a)(1) of the Rules in order to allow time for KLIF to be divested in an orderly manner. Additionally, you request that KLIF be allowed to simulcast the programming of KLIF and KKWM for a period of one week to support the transition of KLIF's audience to KKWM. During this one-week period, you also propose to use the same staff and management to operate the

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1 Section 73.3555 states in pertinent part:

(a) No license for an AM ... broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls one or more broadcast stations in the same service and the grant of such license will result in:

(1) Any overlap of the predicted or measured 5 mV/m groundwave contours of the existing and proposed AM stations...

stations, although no commercials of any kind would be presented on KLIF.[2] Also, after this one-week period, the two stations will operate with separate programming, staff and sales during the remaining waiver period.[3]

In support of your waiver request, you state that grant of a temporary waiver would not result in a significant increase in concentration of control of the media in the Dallas area. Referencing the 1989 Broadcasting/Cable Yearbook, you state that the Dallas-Fort Worth Metro Area is the eighth largest radio market in the country according to Arbitron. You maintain that in addition to the stations that will be controlled during the waiver period by Susquehanna Radio Corp., KLIF's parent corporation, there are a total of twenty-eight radio stations (10 AMs and 18 FMs) licensed to Dallas and Fort Worth.[4] You also note that there are three AM stations and four FM stations licensed to other communities in the Dallas-Fort Worth market. Also, there are ten television stations licensed to Dallas and Fort Worth and two other television stations licensed to other communities in the market. The area is also served by cable television systems with significant subscribership in both Dallas and Fort Worth and three major daily newspapers.

Additionally, you note that Anchor is the licensee of KKWM-FM in Dallas, as well as KKWM(AM). You therefore maintain that if KLIF is sold to an entity which does not have an FM station in the market, KLIF's proposal will ultimately enhance media diversity by reducing the number of AM/FM combinations. (In addition to KKWM AM/FM, there are eight other AM/FM combinations serving Dallas-Fort Worth). You represent that you will make a good faith effort to sell KLIF to a minority-controlled entity and/or an

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2 KLIF originally proposed a simulcast/joint operation and the sale of joint advertising time for a two-month period. Capital Cities/ABC, Inc., on behalf of WBAP-AM, Fort Worth, Texas, filed a petition to deny against that proposal. However, it did not oppose a temporary waiver to allow KLIF to purchase KKWM and dispose of KLIF. An informal objection was also filed by Metropolitan Broadcasting Corp. of Dallas, licensee of KRLD(AM), Dallas, Texas, opposing in its entirety the grant of the proposed temporary waiver. Both pleadings were withdrawn on August 31, 1990, subsequent to the submission of the modified proposal for the one-week period.

3 In your "consolidated reply" to objections filed in this matter, you represented that, with respect to a prior proposal modification reducing the proposed simulcast/joint operation period from sixty days to thirty days, no extensions of that time period would be sought. While this specific representation was not made in your latest amendment, we do not contemplate granting any extensions of the one-week period.

4 Susquehanna Radio Corp. also controls the licensee of KPLX(FM), Fort Worth, Texas.

entity which does not currently own an FM station in the market. In fact, on August 27, 1990, you notified the Commission that KLIF is in negotiations with a potential purchaser and that this entity has no media interests in the Dallas-Fort Worth area.

Finally, you state that upon assignment of KKWM, the public interest will be served because the amount of informational programming available to the Dallas radio market will be increased. In this regard, KLIF currently utilizes a "talk" format and devotes approximately 85% of its programming to news and issues-oriented programming. KLIF's current plan is to transfer the KLIF format to KKWM. Since KKWM's coverage area is substantially larger than KLIF's coverage area during nighttime hours, you contend that informational programming would be available to a larger audience than is presently served at night.[5]

The ultimate objectives of the Commission's multiple ownership rules are to promote economic competition and diversity of programming and viewpoints in order to further the public interest. See Amendment of Section 73.3555 of the Commission's Rules, 4 F.C.C. Rcd. 1723 (1989), recon. granted in part and denied in part, 4 F.C.C. Rcd. 6489 (1989); Multiple Ownership Rules, 97 F.C.C. Rcd. 997 (1984), recon. granted in part and denied in part, 1 F.C.C. Rcd. 802 (1986). The Commission is not, however, without flexibility to respond to situations where application of fixed multiple ownership standards would be contrary to other public interest concerns. Before such a waiver can be granted, even on a temporary basis, an applicant must sustain the burden of showing that the benefits to be achieved by its proposal are in the public interest and that a waiver would not compromise the fundamental policies served by the rule.

On the basis of the representations before us and the circumstances of this case, we find that a temporary waiver of the overlap prohibitions contained in our multiple ownership rules would be consistent with the public interest and previous precedent. In KRTH(AM), 5 F.C.C. Rcd. 2059 (1990), the Commission

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5 KLIF operates on 1190 kHz with 50 kilowatts day and 5 kilowatts night. KKWM operates on 570 kHz with 5 kilowatts day and night. You state that KKWM provides 5.0 mV/m service to all the area served by KLIF (except for small areas to the east of Dallas), and also provides service to large areas to the south, west, and northwest of the Dallas-Fort Worth area which are not served at night by KLIF. Daytime coverage is substantially similar, although KKWM serves certain areas to the northeast, northwest and south of Dallas-Forth Worth not served by KLIF.

granted a temporary waiver of the multiple ownership rules subsequent to modifying the contour overlap provisions from a 1 mV/m to a 5 mV/m proscription for the AM service.[6] Similarly, we find the circumstances presented in this case justify a temporary waiver of the rules. The Dallas-Fort Worth market is well served by an abundance of various media services and the waiver sought is for a very limited period. We are therefore persuaded that no undue concentration of the media would result by grant of the temporary relief requested. Additionally, the sale of KKWM could further advance diversity in the market by separating a commonly-owned AM/FM combination. Indeed, a potential buyer with no media interests in the Dallas-Fort Worth market has already been located for KLIF and if an assignment application is filed and approved by the Commission, the goal of market diversity would be further advanced.[7]

Finally, you request a one-week period of simulcast/joint operation for both KLIF and KKWM following its acquisition of KKWM. This period of time will be used to promote the transition of the KLIF audience to KKWM. As noted, the period of time originally sought was sixty days and the reduction of this time period to one week has resulted in the withdrawal of objections by competitive AM stations in the market. Since your modified proposal is for a very brief period of time and no commercials at all will be presented on KLIF(AM) during this period, we find that no harm to economic competition in the market will result from the one-week simulcast/joint operation period. [8]

Based on the foregoing, a temporary waiver of the contour overlap provisions of Section 73.3555(a)(1) of the Commission's Rules will not result in an undue concentration of media and will not create any detriment to the policies underlying the rule. Accordingly, the contour overlap provisions of Section 73.3555(a)(1) of the Commission's Rules ARE HEREBY WAIVED in

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6 See First Report and Order In MM Docket No. 87-7, 4 F.C.C. Rcd. 1723 (1989).

7 A contract for the sale of KLIF, while drafted, has not been executed and an assignment application has yet to be completed and filed. Processing requirements also impose additional time constraints and the potential for delays on applicants. Further, if this potential sale for KLIF does not come to fruition, the remainder of the waiver period will be needed to seek out another appropriate buyer. Therefore, the six month period, even with a potential buyer being located, does not appear unreasonable.

8 During the period when advertisements are aired on KKWM, KLIF will present "PSAs and other non-advertising fare."

accordance with KLIF Co.'s request. Moreover, upon a finding that the applicant is qualified and the public interest will be served, the application (File No. BAL-900207EB) for assignment of license of KKWM(AM), Dallas, Texas from Anchor Media Ltd., to KLIF Co. IS HEREBY GRANTED.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 90-1237

In the Matter of	)	
	)	
The GTE Telephone Operating Companies	)	Transmittal No. 616
	)	
Revisions to Tariff F.C.C. No. 1	)	

ORDER

Adopted: September 17, 1990; Released: September 19, 1990

By the Chief, Common Carrier Bureau:

1. On July 27, 1990, the GTE Telephone Operating Companies (GTOC) filed Transmittal No. 616 containing rate changes resulting from amended Annual 1990 Tariff Review Plan (TRP) data. These tariff revisions are currently scheduled to become effective September 22, 1990, on 57 days' notice. The amended data, certain forecast data for 1988, were inadvertently omitted from GTOC's TRP but had been provided to the Commission previously (i.e., in 1988). GTOC filed the omitted data in Application No. 243 on July 5, 1990. According to GTOC, the absence of the amended TRP data caused GTOC to fail the Bureau's Report Card test for ELD. GTOC states that if these data had been included it would have passed the Report Card test which would have reduced disallowances for GTOC of California by $10.6 million and for the GTE North Company by $0.5 million on an annualized basis. GTOC Tr. No. 616, Letter of Transmittal at 1.

2. MCI Telecommunications Corporation (MCI) has filed a petition to reject GTOC's filing. MCI notes that the Commission has repeatedly emphasized the importance of accurate cost support data to its review of the annual access filings and states that the Bureau has rejected similar filings in the past. MCI Petition at 3-6. In addition, MCI argues that the Report Card test was reasonably and consistently applied to GTOC and the other LECs and concludes that GTOC should be treated no differently from other carriers. Id. at 6-8.

3. In reply, GTOC asserts that it "did not fail the report card test," GTOC Reply at 2, and that it did not omit the data that it now submits. Rather, GTOC argues, the data it now submits demonstrate that GTOC passed the test. Moreover, GTOC contends, these data were already in the Commission's files, having been submitted as part of GTOC's Annual 1988 Access Tariff filing. GTOC thus characterizes its refiling of these data as a means of calling the Bureau's attention to this information. Further, GTOC states, it believed in good faith that it was not required to restate ELD data that

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it had previously filed and of which the Bureau was aware. Id. at 2-4. Finally, because the omitted data were in the Bureau's files, GTOC contends that its failure to state the data as required should not result in an increased disallowance. Id. at 5-7.

4. The Common Carrier Bureau has reviewed GTOC's Transmittal No. 616 as well as MCI's petition and GTOC's reply. We conclude that no compelling argument has been presented that the tariff revisions are patently unlawful so as to require rejection and that no question has been presented that warrants suspension and investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to reject filed against The GTE Telephone Operating Companies' F.C.C. No. 1, Transmittal No. 616 filed by MCI Telecommunications Corp. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

The index and/or table of contents has been removed and photographed separately within this volume year.

For roll film users, this information for the current volume year is at the beginning of the microfilm. For a prior year volume, this information is at the end of the microfilm.

For microfiche users, the index and/or contents is contained on a separate fiche.

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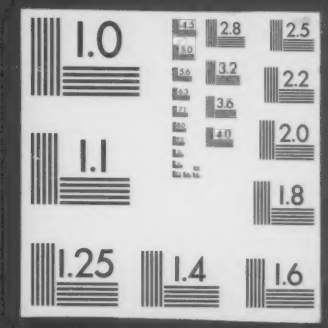
1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0